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No. 07-1

Supreme Court U.S.
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IN THE

Supreme Court of the United States

SUPERVALU INC.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of assessing withdrawal liability under the Multiemployer Pension Plan Amendments Act, does ERISA § 4212(c), 29 U.S.C. § 1392(c), permit a multiemployer pension plan to determine the date of the employer's withdrawal without regard to a bona fide, arms-length collective bargaining agreement pursuant to which the employer's obligation to contribute to the plan permanently ceased in a prior plan year?

PARTIES TO THE PROCEEDING
(Rule 14(b))

The names of all the parties to this proceeding in the United States Court of Appeals for the Third Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

SUPERVALU INC. (NYSE: SVU) has no parent corporation, and there is no publicly-traded corporation that holds ten percent or more of its stock.

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SUPERVALU INC. ("SUPERVALU" or "Company"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit ("Third Circuit" or "court of appeals") in this case.

OPINIONS BELOW

The opinion of the Third Circuit is published at 500 F.3d 334, and is reprinted in the Appendix to this Petition at 4a-28a. ("Pet. App. __a-__a.") The Memorandum Order of the United States District Court of the Western District of Pennsylvania ("District Court") granting Petitioner's motion for summary judgment and overruling the Respondent's objections to the Report and Recommendation of the Magistrate Judge of the District Court is published at 442 F. Supp. 2d 252, and is reprinted in the Appendix to this Petition at 29a-42a. The Amended Memorandum Order of the District Court is unpublished, but is reprinted in the Appendix to this Petition at 43a-45a. The Report and Recommendation of the Magistrate Judge of the District Court is published at 442 F. Supp.2d 252, 259-67, and is reprinted in the Appendix to this Petition at 46a-68a. The Arbitrator's Findings, Opinion and Award (hereinafter "Award") is unpublished, but is reprinted on the Appendix to this Petition at 69a-91a.

JURISDICTION

The Third Circuit's decision and order were entered on August 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The principal statute involved in this case is section 4212(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as added by section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1392(c).

> If a principal purpose of any transaction is to evade or avoid liability under this part [*i.e.*, Part 1 of Title I, Subtitle E of ERISA, 29 U.S.C. §§ 1381-1405], this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c).

Two additional provisions of MPPAA's amendments to ERISA are involved in this case. The first is ERISA section 4203(a), which provides that:

> For purposes of this part, a complete withdrawal from a

> multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1383(a).

The second is ERISA section 4212(a), which provides that:

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law.

29 U.S.C. § 1392(a).

STATEMENT OF THE CASE

1. Respondent Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("Fund") is the plan sponsor of a multiemployer pension plan. SUPERVALU contributed to the Fund on behalf of employees at its Belle Vernon, Pennsylvania facility ("Facility") pursuant to collective bargaining agreements with Teamsters Local No. 872 ("Union"). *See* 2/1/00 Mechanical & Building Maintenance Collective Bargaining Agreement (SA 1)[1], and 2/1/00 Grocery Warehouse Collective Bargaining Agreement (SA 35). Each of the collective bargaining agreements was subject to amendment during its term by mutual written agreement, and reserved management's unilateral authority to close the Facility. SA 5, 7, 30, 39, 42 and 75.

On March 14, 2002, SUPERVALU announced its decision to close the Facility due to a shrinking customer base and associated reductions in the volume of business. Pet. App. 71a. SUPERVALU and the Union bargained over the effects of the closure, *id.*, as they were required to do pursuant to sections 8(a)(5) and 8(d) of the National Labor

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[1] References to "SA" are to Appellee's Supplemental Appendix and Addendum filed by Petitioner in the Third Circuit on March 6, 2007.

Relations Act, *see First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

2. One of the factors that influenced the effects bargaining was SUPERVALU's potential withdrawal liability to the Fund. Either the cessation of covered operations at the Facility or the cessation of the obligation to contribute to the Fund for its employees would result in SUPERVALU's complete withdrawal from the Fund under the provisions of MPPAA.[2] SUPERVALU knew it would have no withdrawal liability if a withdrawal occurred on or before June 30, 2002, the last day of the Fund's 2001/2002 plan year.[3] SUPERVALU also was aware that the value

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[2] Under § 4203(a) and (e) of the Act, 29 U.S.C. § 1383(a) and (e), a complete withdrawal from a multiemployer plan occurs when the employer "permanently ceases to have an obligation to contribute under the plan," or "permanently ceases all covered operations under the plan," 29 U.S.C. § 1383(a) and the date of such withdrawal is the date of the cessation of covered operations or of the obligation to contribute, 29 U.S.C. § 1383(e). "[O]bligation to contribute" means "an obligation to contribute arising . . . under one or more collective bargaining (or related) agreements." 29 U.S.C. § 1392(a)(1).

[3] Withdrawal liability for a complete withdrawal from a multiemployer pension plan is based on the multiemployer plan's unfunded vested benefit obligations ("UVBs") as of the last day of the plan year immediately preceding the year in which the complete withdrawal occurred and, in some circumstances, the plan's UVBs as of the close of prior plan years. *See ERISA* § 4211(b), 29 U.S.C. § 1391(b); *and see generally, Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417-18 (1995).

of the Fund's assets had declined for the first three quarters of the Fund's 2001/2002 plan year, and that it would be exposed to the risk of a withdrawal liability assessment if it withdrew from the Fund after June 30, 2002. However, SUPERVALU did not know at the time how much unfunded liability the Fund would have as of June 30, 2002, or how much it might be assessed for a withdrawal occurring after this date.

In May 2002, SUPERVALU and the Union entered into agreements governing the effects of the Company's decision to terminate operations (collectively, "the Termination Agreement") which provided that SUPERVALU's obligation to contribute to the Fund would cease on June 29, 2002. Pet. App. 12a. The Termination Agreement also provided for enhanced severance benefits and an hourly wage increase applicable to bargaining unit members who might continue to work after June 29, 2002. *Id.* at 12a–13a. SUPERVALU made its last contribution to the Fund for the period ending June 29, 2002, and informed the Fund that it withdrew effective as of that date. Pet. App. 50a. Most of the Facility's employees worked through late July 2002. Pet. App. 75a.

3. On February 4, 2003, the Fund assessed $4.3 million in withdrawal liability against SUPERVALU, and demanded payment of the assessment in a lump sum or in monthly installments beginning on April 15, 2003. Pet. App. 75a. The notice of the

assessment recited the Fund's determination that the Company had withdrawn from the Fund in a complete withdrawal after July 1, 2002, *i.e.*, not on June 29, 2002, the date as of which its obligation to contribute under the Termination Agreement permanently ceased. Pet. App. 76a. This determination purportedly was based on section 4212(c) of ERISA, 29 U.S.C. § 1392(c), which authorizes a multiemployer pension plan to assess and collect withdrawal liability without regard to a transaction "[i]f a principal purpose of [the] transaction is to evade or avoid [withdrawal] liability." 29 U.S.C. § 1392(c).

4. While making installment payments on the Fund's assessment as the MPPAA requires, *see Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 197 (1997), SUPERVALU timely demanded arbitration to contest the assessment pursuant to section 4221(a)-(b) of ERISA, 29 U.S.C. § 1401(a)-(b). Pet. App. 14a. The Arbitrator held that the Termination Agreement "fit[s] squarely within the plain language of [ERISA § 4212(c), 29 U.S.C.] § 1392(c), and justif[ies] the Fund's determination that it should be disregarded for purposes of assessing withdrawal liability." Pet. App. 79a. The Arbitrator accordingly upheld the assessment, concluding that "the Fund properly determined that SUPERVALU engaged in a transaction which had a principal purpose of evading or avoiding withdrawal liability arising under [the] MPPAA." Pet. App. 90a.

5. SUPERVALU brought this action under ERISA section 4221(b)(2), 29 U.S.C. § 1401(b)(2), seeking modification of the Award to reflect that SUPERVALU's complete withdrawal from the Fund occurred on June 29, 2002, and that no withdrawal liability could properly be assessed against SUPERVALU based on the withdrawal. On cross-motions for summary judgment, based on a stipulated record, the District Court rejected the Award's "plain meaning" approach and held (in accordance with what it termed "the better view") that "the meaning of the phrase 'avoid or evade' [in Section 4212(c)] is not plain, but . . . the phrase has a well understood meaning in the law." Pet. App. 37a.

The District Court then adopted the reasoning of *Int'l Typographical Union Negotiated Pension Plan and Ft. Worth Telegram,* 5 Empl. Benefits Cas. (BNA) 1193 (1984) ("*ITU*"), a MPPAA arbitration award holding that section 4212(c) was "totally inapplicable" in the case of a bona fide, arms-length collective bargaining agreement that terminated the employer's obligation to contribute in a more favorable year in order to reduce the employer's withdrawal liability. Pet. App. 31a (adopting Report and Recommendation of Magistrate Judge); Report and Recommendation of Magistrate Judge, Pet. App. 58a-60a (citing and quoting *ITU,* 5 Empl. Benefits Cas. (BNA) at 1197).

The District Court also held that under ERISA sections 4203 and 4212(a), 29 U.S.C. §§ 1383 and 1392(a), the date of an employer's complete withdrawal is the date of the permanent cessation of the employer's obligation to contribute under a collective bargaining agreement or applicable labor management relations law, and that sections 4203 and 4212(a), 29 U.S.C. §§ 1383 and 1392(a), leave no room for the exercise of discretion in determining the date when a complete withdrawal occurs. Pet. App. 39a. The District Court also found that

> [SUPERVALU's] complete withdrawal from the plan occurred on June 29, 2003. Nothing in the record or the statutory scheme permits the Fund, an arbitrator, or a court to vary that date.

Pet. App. 39a (citing sections 4203 and 4212(a), 29 U.S.C. §§ 1383 and 1392(a)).

The District Court also articulated an alternative rationale for modifying the Award. Cross-referencing its discussion of the relationship of sections 4203 and 4212(a) with section 4212(c), the District Court stated

> [O]ne could argue that when the kind of transaction in issue . . . is a transaction contemplated by the statute under which the date for determining withdrawal liability may be established,

> the completion of the transaction could not be a means under the statute to avoid or evade liability.

Pet. App. 38a n.37.

6. On appeal, the Third Circuit reversed the District Court and ordered that the arbitration award be reinstated. The court of appeals held that because the statutory terms "transaction," "evade," and "avoid" in section 4212(c) are undefined in the MPPAA, they must be interpreted "in accordance with their ordinary and natural meaning," and that when those terms were so interpreted, section 4212(c) is "unambiguous." Pet. App. 19a. The court of appeals relied solely on broadly worded dictionary definitions to find the "ordinary and natural meaning" of these words, without considering whether it would be more appropriate to treat the statutory words or phrases as legal terms of art.

> The noun "transaction" means "[t]he act of transacting or the fact of being transacted," and the verb "transact" means "[t]o do, carry on, or conduct" or "[t]o conduct business." The verb "avoid" means "[t]o stay clear of" or "[t]o keep from happening" and is synonymous with escape. The verb "evade" means "[t]o escape or avoid by cleverness or deceit" or "[t]o fail to make a payment of."

Pet. App. 19a-20a (citations omitted). Based solely on those definitions, the Third Circuit adopted the following construction of section 4212(c):

> Under a plain language statutory reading the provision applies when a contributing employer enters a transaction with a principal purpose of escaping its duty to pay withdrawal liability to the plan or fund.

Id. Without alluding to the contrary conclusions reached by the Magistrate Judge and the District Judge, the court of appeals applied the foregoing construction of the statute to conclude that "SUPERVALU violated ERISA § 4212(c) by entering the Termination Agreement with the Union." Pet. App. 19a.

REASONS FOR GRANTING THE WRIT

SUMMARY

The Third Circuit's construction and application of section 4212(c) in this case represents a radical departure from all existing precedent, including *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund,* 827 F.2d 491, 499 (9th Cir. 1987), a decision of the Ninth Circuit with which the decision in this case is in direct conflict. Turning its back on almost

twenty-five years of precedent, the Third Circuit held that a multiemployer pension plan is not only permitted but required by section 4212(c) to assess withdrawal liability by disregarding the terms of a bona fide, arms-length collective bargaining agreement that caused the permanent cessation of the employer's contribution obligation (and therefore its withdrawal) in a prior, zero-liability year.

The decision of the court of appeals explodes what previously had been a *de facto* consensus regarding the application of section 4212(c). Until this case, no federal court or MPPAA arbitrator ever had authorized a multiemployer pension plan to invoke section 4212(c) to disregard a transaction other than a business reorganization, a transfer of corporate shares or other change in business ownership, or a conveyance of the assets of a trade or business. Every previous attempt to apply section 4212(c) to determine withdrawal liability by disregarding the terms of a collective bargaining agreement had been rejected, even where it was assumed or admitted that the terms in question had been proposed or adopted solely to reduce the employer's exposure to withdrawal liability.

Both the holding and the rationale of the Third Circuit's decision will destabilize the law relating to multiemployer pension plans and sow confusion about the scope and meaning of section 4212(c) among the lower federal courts and MPPAA arbitrators. To reach its conclusion in this case, the

court of appeals formulated a sweeping interpretation of section 4212(c) according to which that section may be applied to disregard any employer activity whatsoever if the employer undertakes the activity to "escape its duty to pay withdrawal liability." Indeed, as one commentator already has noted, under the court of appeals' expansive plain meaning analysis, a plan could impose withdrawal liability on an employer that retains workers in covered employment if the employer's motive for keeping them is to avoid withdrawal liability.

The decision of the court of appeals warrants review in this Court. Few areas of the law require greater clarity or national uniformity than the law relating to employer withdrawal liability. Given the starkly defined contrast between the Third Circuit's and the Ninth Circuit's conflicting interpretations of section 4212(c)'s operative terms, there is no need to await further developments in other circuits.

ARGUMENT

I. The Third Circuit's Plain Meaning Decision Directly Conflicts With Settled Decisional Precedent Including a 1987 Decision of the Ninth Circuit on the Meaning of Section 4212(c)'s Key Terms.

The Third Circuit's decision interpreted section 4212(c) by equating its operative terms with broad (if not literally all-encompassing) dictionary definitions of the words "transaction," "evade," and "avoid." The resulting construction of section 4212(c) directly conflicts with the Ninth Circuit's construction of that section in *Cuyamaca Meats, Inc.*, 827 F.2d 499, as well as with the Ninth Circuit's interpretation of the specific statutory terms "transaction" and "evade or avoid."

The employers in *Cuyamaca Meats* were engaged in statutorily-required negotiations following the expiration of a collective bargaining agreement. They made what they termed a "final offer" that, if accepted or implemented following an impasse, would have caused their obligation to contribute to a multiemployer pension plan to cease during the plan's 1981-1982 plan year. However, when the employers learned a few days later that their withdrawal liability would be greatly reduced if they withdrew in the 1982-1983 plan year, they amended their final offer so that their obligation to contribute to the plan would permanently cease after the first

month of the new plan year, with the intention of implementing this proposal following the declaration of an impasse. Completing the parallel to this case, the employers in *Cuyamaca Meats* "conced[ed] that a purpose of their final offer of May 5, 1983, was to minimize their withdrawal liability." *Id.*

Despite the admitted purpose of the employers' timing for implementing their final offer, the Ninth Circuit held that the pension plan was not permitted to rely on that timing to invoke section 4212(c) as a basis for constructively moving the withdrawal date into a different year, thereby enabling the plan to assess greater withdrawal liability.

> Even assuming that this aim was a principal purpose of the Employers' last offer to the union . . . the Employers' May 5, 1983, offer was not a transaction covered by 29 U.S.C. § 1392(c).
>
> * * *
>
> It is true that the purpose, and an effect, of the May 5 offer was to delay the calculation of withdrawal liability until after June 30, 1983, and to thereby minimize such liability. Such an effect, however, was not an evasion or avoidance of withdrawal liability within the meaning of 29 U.S.C. § 1392(c).

Cuyamaca Meats, 827 F.2d at 499. As section 4212(c) is construed in the Ninth Circuit, then, "Employer proposals made during negotiations toward a collective bargaining agreement, and motivated, at least in part, by a desire to minimize withdrawal liability, are not transactions entered into in order to evade or avoid withdrawal liability within the meaning of 29 U.S.C. § 1392(c)." *Id.*

The Third Circuit's decision acknowledges that section 4212(c) was applied differently than in *Cuyamaca Meats*, but does not acknowledge the direct conflict with the Ninth Circuit. Instead, the Third Circuit posited that there was no difference in the construction of the statutory language in the two decisions.

> *Cuyamaca Meats* dealt with a transaction in which the employers violated the plain meaning of the statute, but did not frustrate the purpose of the statute. *Id.* at 499. Because the purpose of the statute was not frustrated, [the Ninth Circuit] held that the employers did not violate the statute.

Pet. App. 24a n.22.

Nothing in the *Cuyamaca Meats* opinion supports distinguishing it on this basis. To the contrary, the construction and application of section 4212(c) in

Cuyamaca Meats is self-evidently based on an interpretation of the statutory terms. *Cuyamaca Meats,* 827 F.2d at 499 (a transaction intended to have the effect, and actually having the effect, of triggering an employer's withdrawal in a lower-liability year "was not an evasion or avoidance of withdrawal liability *within the meaning of 29 U.S.C. § 1392(c).*") (emphasis added).

To be sure, the Ninth Circuit's discussion of the effect of the particular transaction in issue in *Cuyamaca Meats* includes the statement that "[t]he Employers' . . . delay in withdrawing from the Pension Fund . . . did not undermine the goals of the MPPAA." *Id.* However, the delay clearly had both the purpose and effect of reducing the employers' withdrawal liability assessment. The only difference between *Cuyamaca Meats* and the instant case is that the timing of SUPERVALU's Termination Agreement accelerated the year of withdrawal whereas the timing of the employers' implementation in *Cuyamaca Meats* deferred the year of withdrawal. Section 4212(c) is not couched in terms of whether a "transaction" is undertaken to advance or defer the year in which the withdrawal occurs.

Moreover, the Ninth Circuit's construction of the statute is not confined to the particular case. It explicitly applies to "[e]mployer *proposals* made during [labor] negotiations," and the analysis and basis for decision does not turn on the particular facts in that case. *Id.* (emphasis added). Since the

Ninth Circuit's holding is cast in general terms, the decision in this case cannot be harmonized with *Cuyamaca Meats* on the basis suggested by the Third Circuit.

II. The Third Circuit's Decision Will Destabilize the Law and Lead to Confusion Among the Lower Federal Courts and Arbitrators Over the Scope of Section 4212(c).

The Third Circuit's interpretation of section 4212(c) is astonishing, both in its breadth and in its novelty. If the *SUPERVALU* opinion is construed literally, there is no limit on the type of employer activity subject to scrutiny under section 4212(c).

> Under a plain language statutory reading [section 4212(c)] applies when a contributing employer enters a transaction with a principal purpose of escaping its duty to pay withdrawal liability.

Pet. App. 20a. Since the opinion equates "to transact" with "to do," and "to escape" with "to avoid," *i.e.*, "[t]o stay clear of" or "[t]o keep from happening," Pet. App. 19a-20a, any employer activity that causes a postponement of a withdrawal liability assessment, or that triggers a withdrawal under circumstances in which the employer believes the amount of its withdrawal liability exposure might be reduced, could fall within the ambit of section

4212(c). For example, under the court of appeals' expansive plain meaning analysis, a plan could impose withdrawal liability on an employer that retains workers in covered employment if the employer's motive for keeping them is to avoid withdrawal liability, by applying the MPPAA "without regard" language to the continued employment of those employees. *See Third Circuit Holds That a Transaction Triggering a Withdrawal Was Entered Into in Order To Avoid Withdrawal Liability, in* 15 ERISA Litig. Rep. 13 (Oct.-Nov. 2007).

Given the breadth of its holding and the unprecedented interpretative approach behind it, the Third Circuit's decision inevitably will give rise to confusion among the lower federal courts and MPPAA arbitrators over the scope of employer activities potentially subject to section 4212(c).[4] As a

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[4] The MPPAA requires that disputes under section 4212(c) must be arbitrated before they may be litigated. Since MPPAA arbitrators not only interpret and apply section 4212(c) but also derive their jurisdiction from the MPPAA, the likelihood that a decision will cause confusion among MPPAA arbitrators poses the same concerns that have prompted this Court to consider the prospect of confusion among the federal district courts as a factor in granting certiorari. *See, e.g., Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980) (writ granted "to forestall a possible conflict in the lower courts"). *Cf. Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557 (1990) (writ granted "[t]o address a conflict among bankruptcy courts").

result, the *SUPERVALU* opinion will destabilize the law applicable to MPPAA withdrawal liability.

The court of appeals decision will also affect implementation of the almost identically worded cognate provision of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722.[5] Indeed, it conflicts in principle with the only judicial opinion construing 26 U.S.C. § 9722, the "evade or avoid" provision of the Coal Act.[6] *See UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163, 174 (S.D. W.Va. 1996) (holding that a sale of a bankrupt coal company's assets under section 363(f) of the Bankruptcy Code, free and clear of Coal Act liabilities alleged to attach to an asset purchaser as a successor employer, does not violate 26 U.S.C. § 9722, even where the seller admits that the sale would not go forward without the "free and clear" provision, in part because "[a]voidance of future obligations for the Buyer is simply a consequence and a condition of the sale."), *aff'd on other grounds sub nom. In re: Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996).

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[5] *Cf. Gutierrez v. Ada*, 528 U.S. 250, 254 (2000) (certiorari granted to resolve conflicting interpretations of identical language in two statutes).

[6] 26 U.S.C. § 9722 states: "If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

Notably, as the drafters of the Coal Act confirmed, section 9722 (entitled "Sham Transactions") is "modeled after, and should be interpreted consistent with Section 4212(c) of [MPPAA], 29 U.S.C. § 1392(c)." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (proposed Coal Act Conference Report).

The Third Circuit's decision explodes a long-standing *de facto* consensus among courts and arbitrators regarding the scope of employer activities that are potentially subject to a fund's unilateral rescission under section 4212(c). Until this case, MPPAA arbitrators and the lower federal courts confined the application of section 4212(c) to two closely related contexts: changes in the ownership or control of any member of the group of enterprises potentially liable for withdrawal liability,[7] or changes in the ownership or control of their assets.[8]

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[7] MPPAA effectively defines the term "employer" to mean the group of trades or businesses that includes the contributing employer and every trade of business under common control with it. *See* ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1); *Bd. of Trustees of Trucking Employees of North New Jersey Welfare Fund, Inc. Pension Fund v. Centra*, 983 F.2d 495, 502 (3d Cir. 1992).

[8] Advisory opinions issued by the Pension Benefit Guaranty Corporation are consistent with this long-held understanding of the type of "transactions" potentially subject to section 4212(c). No PBGC advisory opinion has ever held or even suggested that section 4212(c) can be applied to disregard a collective bargaining agreement. To the contrary, with one ambiguous exception, every PBGC response to a request for an advisory

The application of section 4212(c) to a collective bargaining agreement that fixed the date of withdrawal in order to reduce or eliminate withdrawal liability was rejected in the only two reported decisions that specifically considered the question—*Cuyamaca Meats,* decided in 1987, and *ITU,* decided in 1984, *supra* at 8-9.[9]

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opinion in which the PBGC referenced section 4212(c) has involved an asset sale, the sale or spin-off of a subsidiary, or both. *See* the following PBGC opinion letters available at http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page15645.html: PBGC Opn. 81-41 (Dec. 16, 1981) (sale of subsidiary); PBGC Opn. 82-5 (Feb. 18, 1982) (same); PBGC Opn. 82-17 (May 26, 1982) (same); PBGC Opn. 83-10 (May 12, 1983) (successive section 4204 asset sales); PBGC Opn. 84-7 (Dec. 20, 1984) (incorporation of parent company's previously unincorporated division, followed by spin-off to shareholders of the parent); PBGC Opn. 85-29 (Dec. 5, 1985) (corporate reorganization and spin-off); PBGC Opn. 90-1 (March 20, 1990) (successive asset sales under section 4204 sale followed by incorporation and sale of subsidiary under section 4218); PBGC Opn. 92-1 (Mar. 30, 1992) (asset sale by one contributing subsidiary followed by section 4218 sales of two other subsidiaries); *cf.* PBGC Opn. 85-5 (Jan. 30, 1985) (considering how a special provision of the MPPAA applicable only to the construction industry would apply where a business ceased making contributions to a construction industry pension fund but continued performing construction work through subcontractors).

[9] *Malden Mills Indus., Inc. v. ILGWU Nat'l Retirement Fund,* 766 F. Supp. 1202 (D. Mass. 1991), cited by the Fund below, is not to the contrary. There, the district court rejected an employer's attempt to treat an amendment to a collective

The Third Circuit's break with the *ITU* decision raises a particular cause for concern about clarity and consistency in the interpretation of section 4212(c) because the facts in *ITU* are indistinguishable from the facts of this case. During contract renewal negotiations in 1981 and 1982, the union and the employer agreed that the employer would cease contributing to a multiemployer pension plan and would increase the wages of the covered employees "by an amount equal to such contributions." *ITU*, 5 Empl. Benefits Cas. (BNA) at 1194. The employer "wanted the flexibility to pick the exact date for cessation [of the obligation to contribute] in order to reduce its withdrawal liability to the Plan," and the union agreed to allow the employer to do so. *Id.* The written agreement, which was ratified in August, 1982, specified the employer's chosen date, January 2, 1983 (the second day of the plan's 1983 fiscal year), as the date when its obligation to contribute would cease. *Id.*

As a result of withdrawing in 1983, the employer incurred no withdrawal liability. However, the plan refused to accept contributions for January 1, 1983,

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bargaining agreement that purported to terminate its obligation to contribute as of a retroactive date as effective for purposes of causing the permanent cessation of its contribution obligation on the retroactive effective date. *Id.* at 1205-06, 1210-11.

and assessed withdrawal liability based on a withdrawal date of December 31, 1982. In arbitration, the plan relied on section 4212(c) to justify the assessment. *Id.* at 1195. The arbitrator overturned the plan's assessment, holding that section 4212(c) is "totally inapplicable" to a bona fide arms length collective bargaining agreement that indisputably caused the employer's contribution obligation to cease permanently as of a specified date in a lower-liability year. *Id.* at 1197.

In contrast, the *SUPERVALU* panel defines "transaction" as equating to "to do", which would encompass an employer's decision to accelerate the permanent cessation of covered operations to occur on the last day of the plan year, in order to avoid a larger liability assessment that would accompany a permanent cessation in the subsequent plan year. Likewise, an employer that decided to defer the permanent cessation of covered operations until the beginning of a new plan year solely to minimize its withdrawal liability would run afoul of the court of appeals' broadly articulated test for identifying transactions that entitle a plan to invoke section 4212(c).

In addition to breaking with the holding in *ITU*, the Third Circuit's decision adopted an analytical approach to the interpretation of section 4212(c) that is entirely different from the approach employed in *ITU*, thereby increasing the potential for confusion in subsequent cases. The Third Circuit's decision

departs from *ITU*'s reasoning in two respects. First, like the District Court in this case, the arbitrator in *ITU* held that:

> [t]he terms "evade or avoid" have a well understood meaning in the law. They refer to essentially fraudulent types of transactions, lacking in economic substance, which are designed to prevent the employer from actually being assessed the true withdrawal liability which it owes under the statute.

Id. The Third Circuit's decision, however, did not consider whether "evade or avoid" might be a term of art—legal or otherwise—and instead looked only to general dictionary definitions, *see* Pet. App. 19a, published a dozen years after MPPAA's enactment, indeed the same year Congress codified the Sham Transaction provision in the 1992 Coal Act, 26 U.S.C. § 9722, employing the precise same phrase – evade or avoid.

Second, like the District Court in this case, the arbitrator in *ITU* held that

> Of necessity, whenever an employer withdraws from a multi-employer pension plan a specific date for the withdrawal must be selected. Nothing in MPPAA gives the Plan the right to

> select the withdrawal date. On the contrary, MPPAA is quite clear that the withdrawal date is to be determined by reference to the employer's obligation to contribute. ERISA § 4212(a) defines the phrase "obligation to contribute" as meaning "an obligation to contribute arising – (1) under one or more collective bargaining (or related agreements), or (2) as a result of a duty under applicable labor management relations law . . ."

Id. In contrast, the Third Circuit's decision treats section 4212(c) as self-executing (a reading of the statute not advocated by either party below), thereby permitting the Fund to disregard the date specified in a collective bargaining agreement and to instead impose a "constructive" withdrawal date:

> [SUPERVALU] argues that as a matter of law it withdrew on June 29, 2002, when its obligation to contribute ceased. SUPERVALU misunderstands the language of § 4212(c), which provides that any transaction that violates the provision *must be* disregarded. As *we* have determined that the Termination Agreement violated § 4212(c), the Agreement must be disregarded. Therefore, we return to the statute to

> determine when SUPERVALU actually withdrew.

Pet. App. 24a-25a (emphases added).[10]

The flaw in this analysis is that it is circular and assumes the conclusion. As a statutory matter, under section 4203(a) and (c) SUPERVALU withdrew on June 29, 2002 when it ceased to have an obligation to contribute to the Fund under the Termination Agreement (which was lawfully entered into between the Company and the Union). For purposes of section 4212(c), the question is whether SUPERVALU entered into a transaction to avoid or evade liability resulting from *that* withdrawal.[11]

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[10] SUPERVALU's brief before the court of appeals noted that (a) the Award found that SUPERVALU's duty to contribute actually had ceased on June 29, 2002; (b) the Award found that SUPERVALU did not in fact make contributions after June 29, 2002; and (c) there was no evidence of any action, demand or claim by the Fund for contributions from SUPERVALU for any subsequent period. On that basis, SUPERVALU argued that there was no dispute of fact regarding the permanent cessation of its obligation to contribute on June 29, 2002, so that it was entitled as a matter of law to a summary judgment establishing June 29, 2002, as the date of its complete withdrawal.

[11] The fact that SUPERVALU's withdrawal in plan year 2002 resulted in zero liability is mere happenstance. The court of appeals' analysis and holding would have been the same if SUPERVALU would have incurred *some* liability for a withdrawal occurring on June 29, 2002, but not as much as for a withdrawal occurring in July, 2002.

The court of appeals misapprehends the interplay between section 4203(a)(1) (complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan) and section 4212(c) (transaction to evade or avoid liability is to be disregarded), because the court assumes an employer that arranges its affairs in a manner that results in a withdrawal in a year with less liability is escaping its "duty" to pay withdrawal liability. Pet. App. 20a. The court assumes that an employer has a "duty" to withdraw in a year of higher liability, but this is not what the MPPAA requires. An employer's statutory duty is to pay the liability that the plan determines is owed based on the date the withdrawal occurred. Nothing in the MPPAA (or its legislative history) imposes an affirmative duty on an employer to avoid making decisions or taking actions that have the purpose or consequence of reducing its withdrawal liability.

III. Deciding Between the Ninth Circuit's and the Third Circuit's Irreconcilable Interpretations of Section 4212(c) is of Great Public and Private Importance.

A. The Magnitude of the Interests Involved and the Recognized Importance of Nationally-Uniform Rules Relating to Multiemployer Pension Plans Favor Granting the Writ.

The importance of ensuring the proper interpreting of the MPPAA's withdrawal liability

provisions cannot be questioned. An estimated 300,000 employers nationwide contribute to multiemployer pension plans. *See* U.S. Department of Labor, Employee Benefits Security Administration, Annual Funding Notice for Multiemployer Defined Benefit Pension Plans, 71 Fed. Reg. 1904, 1909 (Jan 11, 2006). Moreover, "[m]ultiemployer plans cover most unionized workers in the trucking, retail food, construction, mining and garment industries." Pension Benefit Guaranty Corporation 2006 Annual Report at 18, *available at* http://www.pbgc.gov/about/annreports.html. Approximately 9.9 million active and retired employees are covered by the roughly 1,540 multiemployer plans insured by the PBGC. *Id.*

This Court has granted certiorari in withdrawal liability cases on two prior occasions where the only questions presented were matters of statutory interpretation involving withdrawal liability assessments. *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 421 (1995) (citing *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Co.*, 512 U.S. 1234 (1994) (certiorari to review a decision of the Seventh Circuit granted because the decision conflicted with a holding of the Third Circuit in *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85, 95-100 (3rd Cir. 1990), on the interpretation of ERISA § 4219(c)(1)(A)(i));[12] *Bay*

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[12] In fact, certiorari was granted in the *Huber* case prior to the development of the circuit split, but the writ was dismissed

Area Laundry, 522 U.S. at 200 (construing and applying the MPPAA's limitations provision, 29 U.S.C. § 1451(f)(1), to an action to collect withdrawal liability; certiorari granted to resolve a conflict among four Circuits on one question presented, and between two Circuits on a subsidiary question).

Similarly, this Court granted certiorari in a case involving the constitutionality of the MPPAA's dispute resolution procedures, where the Court held that one constitutional question presented could be resolved only by applying the avoidance canon to construe an otherwise incoherent provision of MPPAA's dispute resolution mechanism for withdrawal liability assessments. *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 615 n.10 (specifying the questions presented), 627 (finding "the statutory language itself incoherent"), and 628-30 (applying the avoidance canon to construe section 4221(a)(3)(A) as "[t]he only way out of the muddle") (1993).

Awaiting further developments from other circuits would be especially problematic because of the potential for the Third Circuit's decision to be given

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pursuant to Supreme Court Rule 46. *Huber v. Casablanca Indus., Inc.*, 506 U.S. 1088 (1993); *cf. Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), *aff'd*, 513 U.S. 414 (1995).

retroactive effect to scrutinize "transactions" occurring as far back as 1980. It was settled by this Court's opinion in *Bay Area Laundry* that there is no definite time period following a withdrawal within which a plan must make a withdrawal liability assessment and that the statute of limitations on an action to collect withdrawal liability does not begin to run until after the plan assesses liability and demands payment. *Bay Area Laundry*, 522 U.S. at 202, 205. Thus, within every circuit except the Ninth, the decision in this case could result in multiemployer plans revisiting transactions that occurred as long ago as 1980, and issuing withdrawal liability assessments based on this new gloss the Third Circuit has given to section 4212(c).

B. The Third Circuit's Expansion of Section 4212(c) to Invalidate Traditional Business Planning Decisions Will Discourage Employers from Participating in a Multiemployer Pension Plan.

The Third Circuit's broad interpretation of the terms "transaction", "avoid" and "evade" necessarily calls into question the extent to which a unionized employer may legitimately organize its affairs to minimize its exposure to a withdrawal liability assessment. Pet. App. 19a-20a. A straightforward application of the court of appeals' holding means that even though an employer does not violate its labor contract by closing, selling or contracting out its operations to a third party, the employer may

nevertheless violate federal law in the exercise of these rights if its motivation in undertaking such action was to terminate participation in a multiemployer pension plan at a time when it would incur minimal withdrawal liability. Ironically, the uncertainties flowing from the *SUPERVALU* decision may make employers reluctant to agree to participate in multiemployer pension plans in the future, since it appears that their ability to target a date to withdraw that is advantageous to them can be countermanded by the plan.

Similarly, the *SUPERVALU* decision may deter employers that already participate in multiemployer pension plans from exercising their statutory right to seek information from a plan relating either to the plan's funding status or to their own withdrawal liability exposure. *See* 29 U.S.C. § 1401(e) (on request, plan required to make available to an employer general information necessary for the employer to calculate its withdrawal liability, and, for payment of a fee, plan sponsor must provide an employer an estimate of the employer's withdrawal liability). The mere act of obtaining this information will provide the plan with "evidence" that the employer was aware of its liability, and engaged in actions to "escape" its "duty" to pay it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3829

SUPERVALU, INC.

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA
TEAMSTERS AND EMPLOYERS PENSION FUND, a/k/a THE TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA
TEAMSTERS AND EMPLOYERS PENSION FUND a/k/a SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA
TEAMSTERS AND EMPLOYERS PENSION FUND, a/k/a THE TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND

AREA
TEAMSTERS AND EMPLOYERS PENSION FUND,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 05-cv-00737)
District Judge: Honorable Joy F. Conti

Argued May 17, 2007

Before: FISHER and ROTH, Circuit Judges, and
RAMBO*, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on May 17, 2007.

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* The Honorable Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the order of the District Court entered July 26, 2006, be and the same is hereby REVERSED and REMANDED. All of the above in accordance with the opinion of this Court.

Costs taxed against Appellee.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: August 29, 2007

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3829

SUPERVALU, INC.

v.

BOARD OF TRUSTEES OF THE
SOUTHWESTERN
PENNSYLVANIA AND WESTERN MARYLAND
AREA
TEAMSTERS AND EMPLOYERS PENSION FUND,
a/k/a THE TRUSTEES OF THE SOUTHWESTERN
PENNSYLVANIA AND WESTERN MARYLAND
AREA
TEAMSTERS AND EMPLOYERS PENSION FUND
a/k/a SOUTHWESTERN PENNSYLVANIA
AND WESTERN MARYLAND AREA TEAMSTERS
AND EMPLOYERS PENSION FUND

BOARD OF TRUSTEES OF THE
SOUTHWESTERN
PENNSYLVANIA AND WESTERN MARYLAND

AREA
TEAMSTERS AND EMPLOYERS PENSION FUND,
a/k/a THE TRUSTEES OF THE SOUTHWESTERN
PENNSYLVANIA AND WESTERN MARYLAND
AREA
TEAMSTERS AND EMPLOYERS PENSION FUND,

Appellant

500 F.3d 334

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 05-cv-00737)
District Judge: Honorable Joy F. Conti

Argued May 17, 2007
Before: FISHER and ROTH, *Circuit Judges*,
and RAMBO,* *District Judge*.

(Filed: August 29, 2007)

Vince P. Szeligo (Argued)
Brendan Delaney
Wick, Streiff, Meyer, O'Boyle & Szeligo

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* The Honorable Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

FISHER, *Circuit Judge.*

The Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund (the "Fund") appeals the District Court's grant of summary judgment in favor of SUPERVALU, Inc. ("SUPERVALU"). The Fund claims that the District Court improperly concluded that SUPERVALU did not violate § 4212(c) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1392(c). We agree. For the reasons that follow, we will reverse the District Court's judgment and

remand the case to the District Court for enforcement of the Arbitrator's Award.

I.

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, amended ERISA. The MPPAA was enacted "out of a concern that ERISA did not adequately protect multiemployer pension plans from the adverse consequences that result when individual employers terminate their participation or withdraw." *Warner-Lambert Co. v. United Retail & Wholesale Employee's Teamster Local No. 115 Pension Plan,* 791 F.2d 283, 284 (3d Cir. 1986) (internal citation omitted). "The ... amendments to ERISA were designed to prevent employers from withdrawing from a multiemployer pension plan without paying their share of unfunded, vested benefit liability, thereby threatening the solvency of such plans." *Mfrs. Indus. Relations Ass 'n v. E. Akron Casting Co.*, 58 F.3d 204, 205-06 (6th Cir. 1995) (citing *Mason & Dixon Tank-Lines, Inc. v. Cent. States Pension Fund,* 852 F.2d 156,158-59 (6th Cir. 1988)). At the time the MPPAA was enacted many employers were withdrawing from multiemployer plans because they could avoid withdrawal liability if the plan survived for five years after the date

of their withdrawal. *Debreceni v. Outlet Co.*, 784 F.2d 13, 15-16 (1st Cir. 1986).

Congress recognized that multiemployer pension plans affected millions of Americans and found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, its participants and beneficiaries, and labor-management relations." 29 U.S.C. § 1001a(a). It intended for the MPPAA to uniformly impose withdrawal liability and to "'relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers.'" *Debreceni*, 784 F.2d at 16 (quoting H.R. Rep. 869, 96th Cong., 2d Sess., 67, *reprinted in* 1980 U.S. Code Cong. & Ad.News 2918, 2935). To solve this problem, the MPPAA requires that a withdrawing employer pay its share of the plan's unfunded liability. *See Warner-Lambert*, 791 F.2d at 284. This insures that the financial burden will not be shifted to the remaining employers. *See Cent. States, Se. & Sw. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1371 (7th Cir. 1992).

Section 4201 provides that a withdrawing employer is liable for its share of the plan's unfunded vested benefits. 29 U.S.C.

§ 1381(a).[1] It is the duty of the pension plan to determine whether withdrawal liability has occurred and in what amount. 29 U.S.C. §§ 1382, 1391. Section 4211 provides that the amount of an employer's withdrawal liability is the employer's proportionate share of the unfunded vested benefits existing at the end of the plan year preceding the plan year in which the employer withdraws. 29 U.S.C. § 1391(b)(2)(A). A "complete withdrawal," as in this case, occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). "[T]he date of complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. § 1383(e). The "obligation to contribute" arises "(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a). Although "all covered operations" is not defined in the statute, we have held that it means the "substantial cessation of normal business activity." *Crown Cork & Seal Co., Inc. v. Cent. States Se. & Sw.*

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[1] Although statutory provisions exist that exempt withdrawing employers from incurring withdrawal liability in various situations, none of the exemptions are applicable to this case. *See, e.g.*, 29 U.S.C. § 1384.

Area Pension Fund, 982 F.2d 857, 865-66 (3d Cir. 1992).

SUPERVALU, a wholesale food distributor, was a contributing employer to the Fund, which is a defined benefit multiemployer pension plan governed by ERISA, as amended by the MPPAA. Employers agree to contribute to the Fund based on collective bargaining agreements ("CBAs") with various local Teamsters unions. The Fund, in turn, provides retirement benefits for the employees of the participating employers. SUPERVALU and the Teamsters Local 872 (the "Union") had CBAs which required SUPERVALU to contribute to the Fund on behalf of employees at SUPERVALU's Belle Vernon, Pennsylvania facility through January 31, 2003, or the cessation of covered work.

At the beginning of 2002, SUPERVALU decided to close the Belle Vernon facility for business reasons. On March 14, 2002, SUPERVALU informed its employees of the decision, and that the closure would occur by late summer 2002. As a result of the closure, approximately three-hundred employees would lose their jobs. SUPERVALU and the Union engaged in negotiations from March until May 2002 regarding the effects of the closing.

The negotiations included discussions

regarding SUPERVALU's potential withdrawal liability to the Fund. If SUPERVALU withdrew prior to June 30, 2002, the end of the Fund's 2001-2002 plan year, it would incur no withdrawal liability because the Fund did not have any unfunded vested benefits at the end of the prior plan year (2000-2001). *See* 29 U.S.C. § 1391(b)(2)(A). However, if withdrawal occurred after June 30, 2002, during the 2002-2003 plan year, SUPERVALU would incur significant withdrawal liability based on the unfunded vested benefits that would exist at the end of the 2001-2002 plan year. *See id.*

It is clear from the record that SUPERVALU was aware of its potential liability under both scenarios. First, at SUPERVALU's request, the Fund informed it of the status of the Fund's assets as of April 2002: there was a negative return on the assets during the first three-quarters of the 2001-2002 plan year. Additionally, SUPERVALU informed the Union of the potential withdrawal liability if it were to withdraw in the 2002-2003 plan year. At a bargaining meeting, a SUPERVALU representative stated that terminating the CBAs after June 30, 2002, would place SUPERVALU in another plan year and make it liable for a large unfunded liability. SUPERVALU also explained to the Union that its members would not benefit

from SUPERVALU's continued participation in the Fund, and that SUPERVALU would rather the money go directly to its employees.

Based on this knowledge and its desire to maximize its employees' benefits, SUPERVALU proposed that the CBAs, which were set to expire on January 31, 2003, be terminated and replaced prior to June 30, 2002. It informed the Union that the early termination would prevent SUPERVALU from being assessed withdrawal liability for the 2002-2003 plan year, which was estimated at the time to be in the range of $1 to $1.5 million. If the Union agreed to the early termination, SUPERVALU would make additional payments to its employees as consideration for the agreement.

In May 2002, the Union and SUPERVALU signed a new agreement (the "Termination Agreement"). Under the Termination Agreement, the prior CBAs terminated at 11:59 p.m. on June 29, 2002. The Termination Agreement was identical to the prior CBAs, except that the provisions regarding SUPERVALU's contributions to the Fund were deleted. Additionally, the new terms provided that employees who were entitled to severance payments would receive a lump sum of $2,600 and that employees that continued working after June 30, 2002, would receive a

$2.50 per hour salary increase.[2] The Agreement was ratified by the Union's members on May 31 and June 1, 2002.

SUPERVALU submitted its final contributions to the Fund on June 26, 2002. It also informed the Fund that its obligations to contribute ceased on June 29, when it would withdraw as a participating employer from the Fund. As SUPERVALU withdrew during the 2001-2002 plan year, it believed that it would not incur any withdrawal liability.

However, in February 2003, the Fund sent SUPERVALU a letter assessing $4,316,996 in withdrawal liability against SUPERVALU because it withdrew during the 2002-2003 plan year.[3] *See* 29 U.S.C. § 1382. The letter explained that after conducting an investigation, the Fund believed that SUPERVALU entered the Termination Agreement with a principal purpose of evading or avoiding withdrawal liability in violation of

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[2] Most employees continued working at the facility until July 27, 2002.

[3] The $4,316,996 was SUPERVALU's pro rata share, twenty-three percent, of the Fund's unfunded vested benefits at the end of the 2001-2002 plan year. *See, e.g.*, 29 U.S.C. 1391(b)(2)(A).

ERISA § 4212(c).[4] According to the Fund, even though the facility did not close until July 27, 2002, SUPERVALU withdrew on June 29, 2002, in order to avoid its share of the unfunded vested benefits that were expected to exist at the end of the 2001-2002 plan year. Therefore, for purposes of calculating SUPERVALU's withdrawal liability, the Fund treated SUPERVALU as having withdrawn during the 2002-2003 plan year and ignored the June 29, 2002 date in the Termination Agreement in accordance with § 4212(c).

In a letter dated May 1, 2003, SUPERVALU requested a review of the Fund's demand letter as allowed under the Fund's withdrawal liability procedures and the applicable statutory provisions, *see* 29 U.S.C. § 1399. SUPERVALU argued that its contribution obligations ended on June 29, 2002. Additionally, SUPERVALU argued that the Termination Agreement was a bona fide, arm's length agreement which took it outside of ERISA's "evade or avoid" provision.

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[4] The Fund's letter also asserted an alternative theory of liability: SUPERVALU's obligations to employees who were injured during the 2001-2002 plan year continued into the 2002-2003 plan year. As the Fund agreed during the proceedings before the Arbitrator to waive this argument, it is unnecessary for us to consider whether SUPERVALU could be held liable under such a theory.

Receiving no response to its letter, SUPERVALU initiated arbitration on October 23, 2002, pursuant to ERISA § 4221, 29 U.S.C. § 1401.

Before the Arbitrator, the parties made cross-motions for summary judgment and agreed to limit argument to the issue of whether SUPERVALU engaged in the transaction to evade or avoid liability under § 4212(c) of ERISA.[5] The Arbitrator found that § 4212(c) was unambiguous and that the plain language applied to the transaction at issue in this case. According to the Arbitrator, SUPERVALU was aware of its potential liability and persuaded the Union to enter the Termination Agreement to enable SUPERVALU to avoid the liability. The Union was willing to agree as SUPERVALU offered a bonus to each employee, as well as a pay increase for the remaining employees. Such an arrangement, according to the Arbitrator, fit squarely within the plain language of § 4212(c).

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[5] Depending on the outcome before the Arbitrator, the parties reserved questions such as whether SUPERVALU was required to continue contributing to the Fund on behalf of employees injured during the 2001-2002 plan year, and the calculations and methods used to determine the withdrawal liability. However, the parties later agreed not to make any additional arguments and the Arbitrator's Award became final.

Therefore, the Arbitrator granted summary judgment in favor of the Fund.

SUPERVALU filed a complaint in the District Court seeking to modify the Arbitrator's Award pursuant to ERISA §§ 4301 and 4221, 29 U.S.C. §§ 1451 and 1401. The case was initially heard by a magistrate judge, Francis X. Caiazza, and the parties made cross-motions for summary judgment. After considering the motions, the Magistrate Judge issued a report and recommendation, which proposed setting aside the Award. Additionally, the Magistrate recommended granting summary judgment in favor of SUPERVALU.

According to the Magistrate Judge, the Termination Agreement was not entered into to evade or avoid withdrawal liability. He recognized that SUPERVALU withdrew during the 2001-2002 plan year in order to effect a less costly withdrawal. However, in the Magistrate's view, because the Agreement was bona fide and made at arm's length, § 4212(c) was not applicable. The Magistrate rejected the Arbitrator's determination that the withdrawal date in the Termination Agreement should be disregarded. He explained that the date of withdrawal is determined by the CBA, or in this case the Termination Agreement, and a fund cannot simply disregard the CBA and

choose the date of an employer's withdrawal. Such a rule would enable a fund to choose the date of withdrawal and prevent an employer and a union from entering an agreement to minimize withdrawal liability.

The Fund filed objections to the Magistrate's recommendations, but the District Court adopted the Magistrate's Report and Recommendations. The District Court held that the language of § 4212(c) was not plain, and had to be considered in light of the entire statutory scheme. Additionally, it agreed with the Magistrate's determination that the date of withdrawal is set by the Termination Agreement. The date of withdrawal is based on a statutory formula - when the employer completely withdraws - and nothing in the record enabled the Court to find that a different withdrawal date applied. The District Court concluded by explaining that where it is not clear that an employer acted to evade or avoid, but rather acted to minimize, withdrawal liability, the court would not interfere. In order to find that SUPERVALU had violated § 4212(c), it would have had to alter the rules governing withdrawal liability, which was not within its province. Such an expansion of § 4212(c) would trump § 4212(a), and only Congress has the power to expand the provision. Therefore, the District Court granted summary judgment in favor of

SUPERVALU.[6]

The Fund brought this timely appeal.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Our review of a district court's grant of summary judgment is plenary, and we employ the same standard used by the court below. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005). "Summary judgment is appropriate when `there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). All reasonable inferences must be drawn in favor of the non-moving party. *Id.* An arbitrator's findings of fact are subject to clear error review, but his or her legal conclusions are subject to *de novo* review. *See Crown Cork & Seal*, 982 F.2d at 860-61. The parties stipulated to the facts before the Arbitrator and

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[6] The District Court amended its order on September 1, 2006, granting SUPERVALU's motion to require the Fund to refund to SUPERVALU the money that it paid in withdrawal liability. SUPERVALU had paid $3,948,569 to the Fund. The District Court ordered the refund (plus interest) within ten days of the order.

District Court, so only a question of law remains.

III.

The main issue in this appeal is whether SUPERVALU violated ERISA § 4212(c) by entering the Termination Agreement with the Union. Section 4212(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c). The terms transaction, evade, and avoid are not defined in the statute, and therefore we must construe them in accordance with their ordinary and natural meaning, *United States v. E.I. DuPont De Nemours & Co., Inc.,* 432 F.3d 161, 171 (3d Cir. 2005), and "the overall policies and objectives of the statute," *United States v. Lowe,* 118 F.3d 399, 402 (5th Cir. 1997) (citing *Brown v. Gardner,* 513 U.S. 115, 117-19 (1994)).

The noun "transaction" means "[t]he act of transacting or the fact of being transacted," and the verb "transact" means "[t]o do, carry on, or conduct" or "[t]o conduct business." Am. Heritage Dictionary 1899-1900 (3d ed. 1992). The verb "avoid" means "[t]o stay clear of" or "[t]o keep from happening" and is synonymous

with escape. *Id.* at 128. The verb "evade" means "[t]o escape or avoid by cleverness or deceit" or "[t]o fail to make a payment of." *Id.* at 634. Under a plain language statutory reading the provision applies when a contributing employer enters a transaction with a principal purpose of escaping its duty to pay withdrawal liability to the plan or fund.

In *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity,* 787 F.2d 897 (3d Cir. 1986), we called § 4212(c) a "good faith requirement." *Id.* at 902. The use of the term "good faith requirement" has led to confusion in this case. The good faith requirement was simply shorthand for the language of the statute: an employer cannot act in bad faith, i.e., with a principal purpose, of evading or avoiding withdrawal liability. By using such shorthand, we did not create an additional requirement that must be considered in determining whether the statute was violated. Rather, a principal purpose to evade or avoid connotes bad faith.

The facts of *Dorn's* are too dissimilar to the facts of this case for the opinion to provide much guidance. However, the case is important because we explained that § 4212(c) "was designed to guard against the intentional evasion of liability." *Id.* at 902. There was no violation in *Dorn's* because a "`principal

purpose of the transaction' as a whole [was not] to escape liability." *Id.* In other words, § 4212(c) is violated when one of the main reasons for entering a transaction is to effectuate that goal.[7]

There is no doubt that SUPERVALU had the intent required by the statute. SUPERVALU was aware of the significant withdrawal liability that it would incur by withdrawing during the 2002-2003 plan year when the facility closed and all covered operations ceased. Based on its desire to avoid such liability, SUPERVALU offered enhanced

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[7] SUPERVALU cites our decision in *Board of Trustees of the Trucking Employees of Northern Jersey Welfare Fund, Inc. - Pension Fund v. Centra*, 983 F.2d 495 (3d Cir. 1992), for the proposition that § 4212(c) should not be read literally. *Centra* dealt with a settlement between the fund and a withdrawing employer regarding withdrawal liability. *Id.* at 506-07. We held that the employer did not violate § 4212(c), despite the fact that it entered into the transaction to limit its liability, because the agreement was voluntarily entered into by both the fund and the employer. *Centra* cannot be construed as rejecting a literal interpretation of § 4212(c), but rather demonstrates that a principal purpose of the transaction must be to evade or avoid withdrawal liability. The employer did not agree to the settlement with a principal purpose of evading or avoiding liability, rather the principal purpose was to settle the claim and avoid liability within the larger context of "avoid[ing] the possibility of a larger adverse verdict at trial." *Id.*

severance benefits and wages to the Union's members as consideration for the Union's agreement to enter the Termination Agreement. By entering the Termination Agreement, SUPERVALU withdrew from the Fund during the 2001-2002 plan year, which enabled it to avoid incurring the significant liability that existed for withdrawal during the 2002-2003 plan year. The record indicates that the only reason that SUPERVALU chose to renegotiate the CBAs less than a month before the facility closed was to bring its withdrawal date within the 2001-2002 plan year in order to avoid withdrawal liability for the 2002-2003 plan year.[8] As there was no other reason for SUPERVALU to enter the Termination Agreement, its intention to evade or avoid withdrawal liability was a principal purpose, if not its only purpose. Therefore, SUPERVALU acted with a principal purpose of escaping withdrawal liability in violation of § 4212(c).[9]

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[8] We note that this case does not present the question of whether SUPERVALU could have withdrawn without liability had it simply closed the facility before the end of the 2001-2002 plan year. As that question is not before us, it is unnecessary for us to determine whether such a situation would violate § 4212(c).

[9] We note that although the timing of SUPERVALU's withdrawal under the Termination Agreement was suspicious, our determination is not based on the fact that it withdrew on the last day of the

As noted above, when interpreting undefined terms in a statute, we may also consider the statute's policies and objectives. SUPERVALU's entering of the Termination Agreement was also contrary to the purpose of the MPPAA. As discussed above, Congress enacted the MPPAA to "protect multiemployer pension plans from the adverse consequences that result when individual employers terminate their participation or withdraw." *Warner-Lambert,* 791 F.2d at 284. By amending ERISA, Congress intended to prevent withdrawing employers from threatening the financial stability of a plan by requiring the employers to pay their share of unfunded vested benefit liability. *See Akron Casting,* 58 F.3d at 205-06. By renegotiating the CBAs in order to withdraw from the Fund, SUPERVALU engaged in exactly the type of conduct Congress was trying to prevent. That is, SUPERVALU's withdrawal threatened the financial stability of the Fund as SUPERVALU withdrew in order to avoid paying its share of the existing unfunded vested benefit liability. Therefore, SUPERVALU's conduct violated not

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2001-2002 plan year. Rather, it is the transaction itself that violates the statute, regardless of what day SUPERVALU and the Union agreed to terminate the obligation to contribute to the Fund.

only the plain language of the statute, but also its purpose.[10]

The arguments raised by SUPERVALU do not persuade us that it did not violate § 4212(c).[11] First, it argues that as a matter of law it withdrew on June 29, 2002, when its obligation to contribute ceased. SUPERVALU misunderstands the language of § 4212(c), which provides that any transaction that violates the provision must be disregarded. As we have determined that the Termination Agreement violated § 4212(c), the Agreement must be disregarded. Therefore, we return to

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[10] The parties and the lower courts relied heavily on *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). *Cuyamaca Meats* dealt with a transaction in which the employers violated the plain meaning of the statute, but did not frustrate the purpose of the statute. *Id.* at 499. Because the purpose of the statute was not frustrated, the court of appeals held that the employers did not violate the statute. *Id.* As it is clear that the transaction in this case also violated the purpose of the statute, it is unnecessary for us to decide whether we agree that such a situation does not violate the statute.

[11] It is unnecessary for us to reach the additional arguments made by the Fund as we hold that SUPERVALU violated the statute based on its plain and unambiguous meaning.

the statute to determine when SUPERVALU actually withdrew.[12]

The date of complete withdrawal is the day on which the employer's obligation to contribute to the plan ceases or when all covered operations cease. 29 U.S.C. §§ 1383(a), (e). Because we must ignore the Termination Agreement, the prior CBAs govern SUPERVALU's obligation to contribute. The prior CBAs required SUPERVALU to continue contributing until January 2003. However, the definition of a complete withdrawal is disjunctive; it is either when the obligation to contribute ceases or the cessation of all covered operations. SUPERVALU's cessation of all covered operations occurred before its obligation to contribute ceased. In other words, SUPERVALU actually withdrew when it ceased all covered operations. As noted above,

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[12] We also reject SUPERVALU's argument that ignoring the Termination Agreement enables the Fund to just pick a withdrawal date, which it is not authorized to do under the MPPAA. As evidenced by the discussion below, ignoring the Termination Agreement does not enable the Fund to pick SUPERVALU's withdrawal date on a whim. Rather, once the Termination Agreement is out of the picture, we return to the statute, which provides that a withdrawal occurs when the obligation to contribute ceases, as dictated by a CBA, or when all covered operations cease. *See* 29 U.S.C. §§ 1383(a), 1392(a).

we have defined "all covered operations" as "the substantial cessation of normal business activity." *Crown Cork & Seal,* 982 F.2d at 865-66. The facts indicate that normal business activity at the Belle Vernon facility substantially ceased on July 27, 2002, when most of SUPERVALU's employees were laid off and the facility was closed. Therefore, SUPERVALU completely withdrew from the Fund on July 27, 2002, when it ceased all covered operations.[13]

SUPERVALU's main argument is that § 4212(c) does not apply to bona fide collective bargaining agreements or other transactions that are negotiated at arm's length. Essentially SUPERVALU is suggesting, and the District Court agreed, that bona fide, arm's length transactions are exempt. We disagree.

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[13] Similarly, we reject SUPERVALU's argument that the Arbitrator misunderstood how to calculate withdrawal liability. It is clear from his decision that he understood that a statutory formula was used which based the amount of liability on the unfunded vested benefits existing in the plan year prior to the year in which the employer withdrew. To the extent that SUPERVALU appears to argue that the calculation of withdrawal liability was improper in this case, SUPERVALU has waived any such argument as it agreed to not make such an argument before the Arbitrator.

As discussed above, § 4212(c) is unambiguous. The text in no way suggests that it only applies to sham or fraudulent transactions. The

> statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the [MPPAA] by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability . . . is one of the principal purposes of the transaction.

Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund, 22 F.3d 725, 729-30 (7th Cir. 1994).

Additionally, SUPERVALU claims that there is some support for its proposition in the legislative history.[14] We will not allow an

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[14] The lower courts engaged in extensive discussions of *International Typographical Union Negotiated Pension Plan & Ft. Worth Star Telegram*, 5 E.B.C. (BNA) 1193 (1984) (Mittelman, Arb.) (hereinafter "*ITU*"). According to the arbitrator, "evade or avoid" refers to fraudulent transactions, therefore, a bona fide transaction does not violate the provision. *Id.* at 1197. In part, the arbitrator reached this decision based on legislative history. As explained above, we believe that the statute is clear and therefore we need not consider

examination of the legislative history to create an ambiguity where none exists in the statute. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-68 (2005). "[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Id.* at 568. Therefore, we reject SUPERVALU's claim that a bona fide arm's length transaction is not within the purview of § 4212(c).[15]

IV.

For the reasons stated above, we will reverse the District Court's grant of summary judgment in favor of SUPERVALU and remand the proceeding with directions that the District Court enforce the Arbitrator's Award.

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the legislative history. Additionally, we find no basis for the arbitrator's interpretation of the provision as only applying to fraudulent or sham transactions. Therefore, we are unpersuaded by *ITU*.

[15] We have fully considered the remaining arguments raised by SUPERVALU and we find them also to be without merit.

SUPERVALU, INC., Plaintiff,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREAS TEAMSTERS AND EMPLOYERS PENSION FUND a/k/a THE TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND, Defendants.

No. 05-0737

United States District Court
for the Western District of Pennsylvania

July 26, 2006, Decided
July 26, 2006, Filed

For SUPERVALU, Inc.: Thomas M. Christina, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Greenville, SC.

For Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund: Vincent P. Szeligo, Esq. and Brendan R. Delaney, Esq., Wick, Streiff, Meyer, O'Boyle & Szeligo, P.C., Pittsburgh, PA.

JOY FLOWERS CONTI, United States District Judge.

MEMORANDUM ORDER

On June 5, 2005, this case involving an appeal from an award of an arbitrator was referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

On April 11, 2006 the magistrate judge issued a Report (Doc. 21) recommending that the district court grant the Motion for Summary Judgment filed by the plaintiff, SUPERVALU, Inc. (the "plaintiff"), asking that the final award of the arbitrator be set aside. (Doc. 13). At the same time, the magistrate judge recommended that the court deny the Motion for Summary Judgment filed by defendants, Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund a/k/a the Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund (the "Fund"), seeking confirmation of the final award. (Doc. 11).

Service of the Report and Recommendation was made on the parties. On May 2, 2006, lengthy objections were filed by the Fund. (Doc. 22). On

May 12, 2006, a response to those objections (Doc. 23) was filed by the plaintiff.

The court approaches this case knowing that it should balance, similar to situations involving the National Labor Relations Act, 29 U.S.C. § 158 *et seq.*, "on the one hand, an employer's 'freedom to contract . . . including the right to transfer its assets, reorganize its business or close a portion thereof,'. . . and, on the other, . . . to 'prevent employers from evading obligations under [the applicable statute]. . . .'" Stardyne, Inc. v. National Labor Relations Board, 41 F.3d 141, 148 (3d Cir. 1994)(internal citations omitted). With this responsibility in mind, the court reviewed the submissions of the parties and the record before the magistrate judge. The court adopts the Report and Recommendation as the opinion of the court subject to the following determinations made with respect to the Fund's major objections.[1] These objections are addressed *seriatim*.

The Fund argues first that the magistrate judge did not accord due deference to the findings of the arbitrator, and failed to understand the unique circumstances surrounding the collective bargaining agreement. The court disagrees. The magistrate judge applied the correct standard of review, adopting the arbitrator's findings of fact, and

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[1] The objections not discussed in this order were adequately addressed by the magistrate judge in the Report and Recommendation which is adopted by this court as its opinion.

reviewing his conclusions of law *de novo*. China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 278 (3d Cir. 2003). The magistrate judge identified the legal issues and explained in detail his disagreement with the arbitrator's conclusions of law.

The Fund next contends that the magistrate judge failed to appreciate critical differences between the facts of this case and those in ITU Pension Plan and Ft. Worth Star Telegram, 5 E.B.C. 1193 (E. Mittleman Arb. 1984), and Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987). Again, the court disagrees. The magistrate judge expressly addressed the factual differences in these decisions, and explained why, despite those differences, the legal analysis in each was persuasive and applicable to this case.[2]

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[2] The Fund criticizes, too, the magistrate judge's treatment of the decision in Dorn's Transportation, Inc. v. Teamster's Pension Trust Fund of Philadelphia, 787 F.2d 897 (3d Cir. 1986). Although the magistrate judge confined his discussion of Dorn's to a footnote, that note summarized the essence of Dorn's holding: parties do not violate section 1392(c) when they act in good faith. Beyond that, the court does not find that Dorn's is particularly helpful to either side. Contrary to the finding of the arbitrater, the decision did not define "good faith." Furthermore, Dorn's involved facts dissimilar to those in this case, and, as the parties' analyses make clear, its "rule" is difficult to articulate outside those facts. Dorn's does not, in and of itself, dictate the outcome of this decision.

The Fund turns next to 20 U.S.C. § 1392(c), arguing that the magistrate judge ignored the section's "plain meaning." "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723,756 (1975) (Powell, J., concurring)).

In other words, the threshold question is whether the "language is clear and unambiguous." 2a NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 46.01, at 121-22 (6th ed. 2000). The "plain meaning rule" has been articulated many ways. The court finds the following formulation helpful:

> What has come to known as the plain meaning rule has been given expression in a variety of ways. When the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction.

Id. at 118-19 (quoting Meeks v. West, 12 Vet. App. 352 (1999)).

The Fund argues that the magistrate judge erred in failing to adopt the arbitrator's finding that section 1392(c) "ha[s] a straightforward reading" requiring that the date of withdrawal specified in the

collective bargaining agreement made between the plaintiff and the unions be set aside. The court reexamined the arbitrator's decision and finds that his references to the plain meaning of section 1392(c) are (1) conclusory; (2) unsupported by citation to authority of any kind; and (3) inconsistent with the arbitrator's prior interpretation of the section. The first two observations were reflected in the Report and Recommendation. Report and Recommendation at 6-7. The court, therefore, focuses here on the third observation. In determining whether the magistrate judge erred in failing to invoke a plain meaning rule, the court finds it significant that the arbitrator, in another decision, recognized that the language of section 1392(c) is susceptible of more than one meaning. In the decision captioned In re Flying Tiger Lines, Inc. and Teamsters Pension Trust of Philadelphia, 19 E.B.C. 2830, (Nagle, Arb.), *enforced sub nom.* Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 20 E.B.C. 1050 (D. Del. Dec. 27, 1995) *aff'd sub nom.* Flying Tiger Line, Inc. v. Central States, Southwest and Southeast Areas Pension Fund, 96 F.3d 1382 (3d Cir. Del. 1996)(Table, No. 96-7050), the arbitrator held that the reach of section 1392(c) was limited. He wrote: "Judging at least from the reported decisions, it appears that this provision has seldom been invoked and, with one exception, has never been held applicable." 19 E.B.C. 2846. He then identified five decisions in which section 1392(c) was found inapplicable, noting that the single contrary decision was later withdrawn. Id. at n.5.

The arbitrator also discussed the decision of the United States Court of Appeals for the Third Circuit in Dorn's Transportation v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986), summarizing its holding narrowly: "[I]n the context of the sale of a business, a transaction has as its principal purpose the evasion of withdrawal liability within the meaning of the statute only if *both* parties to the transaction share that purpose." Flying Tiger, 19 E.B.C. at 2847 (emphasis in original). The arbitrator commented: "While *the statutory language might well support a more expansive reading*, other courts have also read the provision narrowly." Id. at n.6 (emphasis added)(citing Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers Pension Fund, 638 F. Supp. 885 (S.D. Cal. 1986), aff d, 827 F.2d 491 (9th Cir. 1987), as rejecting application of section 1392(c) where employer timed withdrawal to minimize liability). The arbitrator's broad interpretation of section 1392(c) in this case does not square with his narrow reading of the same provision in Flying Tiger. If the phrase "evade and avoid" has a plain meaning, that meaning cannot expand and contract depending upon the circumstances.

Although the arbitrator articulated that the applicable statute had a plain meaning, the arbitrator clearly looked beyond the parameters of section 1392(c) in order to reach his decision. He discussed other provisions of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1382, *et seq.* (the "MPPAA"), explaining that the

results in ITU and Cuyamaca[3] turned on the financial status of the plan rather than on the language of the provision alone. He also looked to the provision's legislative history.

The Fund's "plain meaning" argument is also undercut by the fact that decision makers have differed as to the "plain meaning" of the same language. While the arbitrator in this case found that section 1392(c) is not limited to situations involving deception or fraud, the arbitrator in ITU disagreed. He found that the phrase "evade or avoid" has a well understood meaning in the law; it is limited to essentially fraudulent transactions designed to prevent the employer from being assessed the true withdrawal liability which is owed under the statute. The Report and Recommendation's note seven collects decisions adopting this view, applying section 1392(c) to situations where only the parties have engaged in some variety of sham transaction. The section has been applied almost exclusively in these narrow circumstances.

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[3] The arbitrator in Flying Tiger, however, discussed Cuyamaca in a footnote, highlighting the court's narrow interpretation of section 1392(c): "[T]he court rejected a fund's assertion that the employer's timing of a withdrawal so as to minimize liability [was covered]." 19 E.B.C. at 2847 n.6. The arbitrator also noted that the court in Cuyamaca read the legislative history to suggest that section 1392(c) was directed at "'essentially fraudulent maneuvers lacking in economic substance.'" Id. (quoting 638 F. Supp. at 889-90).

The court is persuaded by the relevant case law, particularly the decision in ITU, that the better view is that the meaning of the phrase "avoid or evade" is not plain, but that the phrase has a well understood meaning in the law. Proper application of section 1392(c) can, therefore, be determined only by considering the overall statutory scheme, and the context in which the section is invoked.[4]

Because the magistrate judge was convinced that section 1392(c) was subject to more than one interpretation, he adopted the reasoning of the arbitrator in ITU. He found that it was necessary to examine section 1392(c) in the context of other ERISA provisions, the case law, and the available legislative history. The magistrate judge conducted this examination, fully articulating his reasoning. The court finds that his reasoning and his conclusion were sound.

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[4] Even assuming that a "plain meaning" could be found, one could argue that when the kind of transaction in issue – here, the collective bargaining agreement – is a transaction contemplated by the statute under which the date for determining withdrawal liability may be established, the completion of the transaction could not be a means under the statute to avoid or evade liability. See discussion *infra* concerning the interrelated provisions of the MPPAA, especially the definition of "obligation to contribute." "[S]tatutory language must always be read in its proper context. 'In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" McCarthy v. Bronson, 500 U.S. 136, 139 (1991)(quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

Finally, the Fund argues that the magistrate judge erred in determining the date of the plaintiff's withdrawal. One of the primary points made by the magistrate judge is that determining the date of withdrawal under ERISA does not involve the exercise of discretion; it is fixed instead by a statutory formula. The date of withdrawal is determined with reference to interrelated provisions of the MPPAA. The statute defines the term "complete withdrawal," 29 U.S.C. §§ 1981(b)(2), 1983(a). A complete withdrawal takes place when an employer permanently ceases to have an obligation to contribute under the plan or when the employer permanently ceases all covered operations under the plan. The "obligation to contribute" is defined as an obligation arising under the collective bargaining agreement. 29 U.S.C. § 1392(a). Under the terms of these provisions, the plaintiff's complete withdrawal from the plan occurred on June 29, 2003. Nothing in the record or the statutory scheme permits the Fund, an arbitrator, or a court to vary that date.[5]

The court agrees with the magistrate judge that in creating withdrawal liability Congress acted to protect the financial well-being of funds – not by

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[5] This is not to say that a hypothetical date of withdrawal would not be precluded in cases involving a fraudulent or sham transaction. As the Plaintiff pointed out, using a hypothetical date in that situation would not require ignoring a specific statutory provision, such as section 1383(a). That section unequivocally establishes the date of withdrawal, eliminating the option of setting a hypothetical date.

taking a scattershot approach – but by imposing a specific, calculable disincentive for employers contemplating withdrawal. Withdrawal liability is the penalty. Congress elected to implement this penalty by incorporating specific, detailed, and comprehensive withdrawal liability provisions into an already complex ERISA framework. Countless funds, employers, and employees rely on these provisions in ordering and administering their retirement plans. Where, as here, the facts do not show clearly that the plaintiff acted to evade or avoid, rather than minimize, its exposure to withdrawal liability, the court will not interfere with the established framework. The court is convinced that the circumstances of this case do not warrant expansion of the reach of section 1392(c). To hold otherwise would significantly alter the rules governing withdrawal liability. This is not the province of the court. If the reach of section 1392(c) is to be expanded to the extent that it trumps 1392(a), this expansion should come from Congress.

In reaching this conclusion, both the magistrate judge and the court recognize that the plaintiff, in effect, marched openly to the outer margin of established rules governing withdrawal liability. Because the court concludes that the plaintiff's conduct did not violate the law, it declines to modify unilaterally the penalty provisions of ERISA by reading section 1392(c) more expansively than it has ever been read. Doing so could topple the proverbial first domino. Changing one ERISA

provision could require modifying another, injecting uncertainty and confusion into a scheme where consistency and predictability are critical.

In a final comment, the court assures the parties that it considered their request for oral argument. Because the factual questions have been resolved, and the legal issues have been ably articulated by the parties in their submissions and thoroughly analyzed, the court finds that oral argument is unnecessary.

After a *de novo* review of the submissions of the parties and the record before the court, together with the Report and Recommendation and the objections thereto, the following order is entered:

AND NOW, this 26th day of July, 2006, IT IS HEREBY ORDERED that the plaintiff's Motion for Summary Judgment setting aside the final award of the arbitrator (Doc. 13) is **GRANTED**, and the defendants' Motion for Summary Judgment (Doc. 11) seeking confirmation of the final award of the arbitrator is **DENIED**.

The Report and Recommendation of Magistrate Judge Caiazza dated April 11, 2006 is hereby adopted as the opinion of the court, together with the conclusions set forth in this order.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, SUPERVALU, Inc., and against defendants, Board of

Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund.

The clerk shall mark this case closed.

By the Court,

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

cc:

Francis X. Caiazza
U.S. Magistrate Judge

Counsel of Record

Via electronic mail

SUPERVALU, INC., Plaintiff,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREAS TEAMSTERS AND EMPLOYERS PENSION FUND a/k/a THE TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND, Defendants.

No. 05-0737

United States District Court
for the Western District of Pennsylvania

September 1, 2006, Decided
September 1, 2006, Filed

For SUPERVALU, Inc.: Thomas M. Christina, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Greenville, SC.

For Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund: Vincent P. Szeligo, Esq. and Brendan R. Delaney, Esq., Wick, Streiff, Meyer, O'Boyle & Szeligo, P.C., Pittsburgh, PA.

JOY FLOWERS CONTI, United States District Judge.

AMENDED MEMORANDUM ORDER

As requested in the Plaintiff's Motion to Alter or Amend Judgment (Doc. 20), the Memorandum Order of July 26, 2006 is supplemented as follows, pursuant to Fed. R. Civ. P. 60(a), in order to correct an omission[1] in the original:

And now, this 1st day of September, 2006, IT IS FURTHER ORDERED that the Defendant, Board of Trustees, is directed to refund to SUPERVALU $3,948,560.00 in withdrawal liability paid by SUPERVALU to the Fund, including interest thereon from the date of each installment payment made until the date of the refund. Refund is to be made within ten (10) days following entry of this order.

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[1] 29 C.F.R. Section 4219.31(d) provides that overpayments be refunded at the point that an assessment is overturned by an arbitrator. In its opposition to the Motion, (Doc. 39) the Fund does not cite and the court does not find any provision in the relevant statute or regulations that supports postponing the refund pending conclusion of the appellate process.

In all other respects, the original Memorandum Order stands. within ten (10)days of this order.

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

cc: Francis X . Caiazza
U.S. Magistrate Judge

Counsel of Record

SUPERVALU, INC., Plaintiff,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREAS TEAMSTERS AND EMPLOYERS PENSION FUND a/k/a THE TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND, Defendants.

No. 05-0737

United States District Court
for the Western District of Pennsylvania

April 11, 2006, Decided
April 11, 2006, Filed

For SUPERVALU, Inc.: Thomas M. Christina, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Greenville, SC.

For Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund: Vincent P. Szeligo, Esq. and Brendan R. Delaney, Esq., Wick, Streiff, Meyer, O'Boyle & Szeligo, P.C., Pittsburgh, PA.

FRANCIS X. CAIAZZA, U.S. Magistrate Judge.

REPORT AND RECOMMENDATION

I. Recommendation

Acting pursuant to Sections 4301 and 4221 of the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1451 and 1401, SUPERVALU filed a complaint in this court seeking modification of a final arbitration award made in favor of The Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("the Fund"). The award was based on the Arbitrator's finding that SUPERVALU violated 29 U.S.C. 1392(c) by executing an agreement with its employees' union in order to evade or avoid withdrawal liability to the Fund. Ruling on cross motions for summary judgment, the Arbitrator granted summary judgment in favor of the Fund, obligating SUPERVALU to pay withdrawal liability in the amount of $4,316,996.00. Because the court is left with the firm impression that the Arbitrator erred in applying the law to the facts of this case, it recommends that the Arbitrator's final award be set aside. The Motion for Summary Judgment filed by SUPERVALU (Doc. 13) should be granted, and the Motion for Summary Judgment filed by the Fund (Doc. 11) should be denied.

II. Factual and Procedural Background

The facts are undisputed. In 2002, SUPERVALU, a nationwide wholesale food distributor, operated a facility in Belle Vernon, Pennsylvania. Pursuant to sequential collective bargaining agreements made with representatives of Teamsters Local 872 ("the Union"), SUPERVALU contributed to a multiemployer pension plan established to provide retirement benefits to eligible union employees. The 2002 bargaining agreement was scheduled to expire at the end of January 2003. Approximately one year prior to the expiration date, SUPERVALU, responding to a business downturn, decided to close its Belle Vernon facility, consolidating that operation with another in New Stanton.

Hoping to accomplish this reorganization in the summer of 2002, SUPERVALU initiated discussions with the Union in the spring to resolve issues associated with the effects of the closing. One of these issues - how long SUPERVALU would continue to contribute to the pension plan - had significant economic repercussions for SUPERVALU.

The MPPAA provides that an employer, for various reasons, may opt out of a multiemployer pension plan. Where there is a complete withdrawal[1] the

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[1] ERISA provides that a complete withdrawal occurs if an employer (1) permanently ceases to have an obligation to

employer immediately incurs "withdrawal liability" to the Fund. This liability is defined as "the employer's proportionate share of the plan's 'unfunded benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." Robbins v. Pepsi Metro. Bottling Co., 636 F. Supp. 641, 647 (N.D. Ill. 1986) (quoting Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 725 (1984)).

The Act specifies that withdrawal liability is to be calculated with reference to a plan's unfunded benefits outstanding at the end of the plan year preceding the year of an employer's withdrawal. 29 U.S.C. § 1391(b)(2)(A)(ii). Because the Fund's plan year ended on June 30, the amount owing in the event of SUPERVALU's withdrawal during the 2002 plan year would have been based on the Fund's unfunded vested benefits as of June 30, 2001. Similarly, withdrawal liability for the plan year 2003 would have been calculated on the basis of unfunded vested benefits outstanding as of June 30, 2002.

In April 2002, SUPERVALU consulted the Fund's actuary. It learned that if it withdrew in plan year 2002, it would not incur withdrawal liability because, at the end of 2001, the Fund did not have unfunded benefits. Due to a drop in the

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contribute under the plan, or (2) permanently ceases all covered operations under the plan. 29 U.S.C. 1383(a).

value of Fund assets, withdrawing in plan year 2003 would result in significant withdrawal liability, based on the 2002 shortfall.

In order to effect the less costly 2002 withdrawal, SUPERVALU negotiated a revised collective bargaining agreement with the Union, terminating its obligation to contribute to the Fund as of the end of June 2002. In return for the Union's consent to this termination, SUPERVALU offered and the Union accepted lump sum severance pay and wage premiums. There was nothing clandestine about this agreement; each party understood the financial implications of the withdrawal date. On June 26, 2002, SUPERVALU remitted its final payment of the 2002 plan year, and notified the Fund that it would not make contributions beyond June 29.

About eight months after the withdrawal, the Fund demanded that SUPERVALU begin payments on withdrawal liability of more than four million dollars. This liability assessment was based on the Fund's conclusion that SUPERVALU had not withdrawn from the plan until 2003, and was liable for its pro rata share (23%) of the Fund's unfunded vested benefits outstanding at close of plan year 2002.

The Fund contended that SUPERVALU had not withdrawn from the Fund until 2003 because its attempt to limit its liability by withdrawing on the

last day of plan year 2002 violated the terms of 29 U.S.C. § 1392(c)[2] Under this section:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

According to the Fund, SUPERVALU's purported 2002 withdrawal from the plan and the bargaining agreement upon which it was based should be disregarded. This pushed the withdrawal date into plan year 2003, the year in which SUPERVALU closed its Belle Vernon operation. The Arbitrator found in favor of the Fund, and issued a final award for the full amount of the withdrawal liability assessed. This timely appeal followed.

III. Standard of Review

An arbitrator's conclusions of law in a withdrawal liability case are subject to *de novo* review in federal court. Parmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan A, 872 F.2d 1069, 1071 (D.C.Cir.1989); Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp., 872 F.2d 208, 210-14 (7th Cir.) (1989); Union Asphalts and Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund,

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[2] The parties raised additional issues before the Arbitrator that are not pursued here and will not be discussed.

857 F.2d 1230, 1233-34 (8th Cir. 1988). Arbitration is the primary method for resolution of disputes arising under ERISA and the arbitrators' decisions are entitled to deference. A court will not overturn an arbitrator's application of the law absent a firm conviction that an error was been made.

IV. Discussion

A. The Legal Basis for the Arbitrator's Award

The parties do not contest and the court accepts the Arbitrator's summary of relevant facts:

> SUPERVALU was fully aware that its intended withdrawal from the Fund after June 30, 2002, would result in . . . substantial withdrawal liability due to the investment losses the Fund was experiencing during the plan year ending on that date. It accordingly induced the Union and its members to agree to terminate their existing [collective bargaining agreements] . . . as of June 29, 2002, and to replace them with identical [agreements] stripped of the obligation to contribute to the Fund, thus effecting withdrawal from the Fund one day short of plan year end. To secure the agreement of the Union and its members, SUPERVALU agreed to

> share the resulting liability withdrawal savings....

(Arb. Findings, Op. and Award 7-8). Based on these findings and the language of Section 1392(c), the Arbitrator concluded that the bargaining agreement between SUPERVALU and the Union setting the date on which SUPERVALU would no longer contribute to the Fund should be disregarded. He wrote:

> Giving the [evade and avoid] provision [of Section 1392(c)] a straightforward reading, and according to its words their natural meaning, the conclusion seems inescapable that just such a transaction occurred here.

Id. at 7. The Arbitrator did not cite authority endorsing this reading of the provision.

SUPERVALU challenged the Arbitrator's reliance on Section 1392(c) on the ground that the provision does not apply to a bona fide collective bargaining agreement setting the date of an employer's withdrawal from a plan. It argued that this is the law even where the parties to the agreement concede that the date was chosen in order to minimize the employer's withdrawal liability.

The Arbitrator rejected SUPERVALU's argument, finding that adopting SUPERVALU's

position would perpetuate the very problems that ERISA and the MPPAA were enacted to correct:

> SUPERVALU and its employees had the benefit of a full year of participation - including the accrual of a full year's worth of pension benefits - during which the Fund suffered losses, but by maneuvering, with the Union's acquiescence, to pull out one day short of year end, [SUPERVALU] attempted to avoid any responsibility for underfunded liabilities associated with that experience. As a result, the full burden of funding those liabilities would be shifted to those employers who remained - one of the consequences that the MPPAA was specifically intended to prevent.

Id. at 12 (footnote omitted).[3] On this basis, the Arbitrator upheld the Fund's assessment of withdrawal liability.

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[3] In this statement, the Arbitrator seems to say that SUPERVALU accrued withdrawal liability before the actual withdrawal, beginning at the point where the Fund developed unfunded vested benefits. In its decision in Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., No. 86-304 1995 U.S. Dist. Lexis 1980, at*24 (D. Del. December 27, 1995), the District Court rejected this position, writing: "The section of MPPAA that defines withdrawal liability . . . does not support this reading." This

B. Analysis

The precise question raised here appears to be one of first impression. The court has not found, and has not been directed to another decision invoking ERISA's evade or avoid provision to invalidate the terms of a bona fide arms length collective bargaining agreement. In fact, there are few cases construing Section 1392(c) in any context. For the reasons detailed below, the court is nonetheless convinced that the arbitrator erred in disregarding the date of withdrawal specified in the collective bargaining agreement considered here.

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court agrees. Section 1381(a) states: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, *then* the employer is liable to the plan." (emphasis added). The same interpretation of this section was adopted by the Court of Appeals in Godchaux v. Conveying Techniques, Inc., 846 F.2d 306, 310 (5th Cir. 1988):

> Unfunded vested liability does not completely define or determine withdrawal liability. ERISA does not impose withdrawal liability on every employer that belongs to a pension plan that has an unfunded vested liability. Moreover, ERISA *calculates withdrawal liability according to when the employer withdraws from the pension plan.*

(emphasis added).

1. The Statutory Framework

Because this appeal turns on the underlying purpose and the interpretation of the MPPAA, the court looks first to the broad goals of the Act and the scheme designed to achieve them. ERISA took effect in 1974 to ensure that "if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he actually will receive it." Nachman Corp. v. Pension Ben. Guar. Corp, 446 U.S. 359, 375 (1984). In the years immediately following its enactment, ERISA's shortcomings became apparent. The primary criticism leveled at the Act was its failure to "protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from multiemployer plans." R.A. Gray, 467 U.S. at 723.

In order to remedy this flaw, Congress amended ERISA by enacting the MPPAA in 1980. The MPPAA changed the strategic considerations for an employer contemplating withdrawal:

> It transformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty. That is to say, it imposed a withdrawal charge on all employers withdrawing from an

> underfunded plan whether or not the plan later became insolvent. And, it set forth a detailed set of rules for determining and collecting that charge.

Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414, 417 (1995). In other words, the MPPAA required that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the abandoned plan. Robbins, 636 F.Supp. at 668. This debt or withdrawal liability is the proportionate share of the plan's unfunded vested benefits[4] and is calculated as the difference between the present value of the vested benefits and the current value of the plan's assets. Id., at 671 n.41; 29 U.S.C. §§ 1381, 1391. This exposure to a significant financial penalty was intended to reduce the employers' incentive to leave the plan, and to cushion the financial impact on a plan should a withdrawal occur. R.A. Gray, 467 U.S. at 724.

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[4] The Act provides different methods for computing withdrawal liability. Each method involves allocating the plan's unfunded vested benefits among the participating employers. Unfunded vested benefits are defined as the actuarial present value of all nonforfeitable benefits under the plan, minus the value of the plan's assets. 29 U.S.C. Sections 1391; and 1393(a)(1).

2. Application of the Law

Evaluating the facts of this case against the background of the law, the Arbitrator concluded, in effect, that the MPPAA provisions governing withdrawal liability were inadequate to safeguard the financial welfare of the Fund. In an effort to remedy this perceived inadequacy, the Arbitrator ventured beyond the MPPAA into virgin legal territory, ignoring the terms of the parties' bona fide collective bargaining agreement and conditioning SUPERVALU's right to withdraw on the financial status of the plan. The court is convinced that the Arbitrator's application of section 1392(c) to the facts of this case is inconsistent with the Act and contrary to relevant case law. The court draws from a number of sources to support this conclusion.

The court turns first to the decision in an arbitration proceeding with markedly similar facts conducted four years after enactment of the MPPAA. In Int'l Typographical Union Negotiated Pension Plan and Ft. Worth Telegram, 5 Empl. Benefits Cases 1193, (Mittleman, Arb., March 9, 1984), a collective bargaining agreement between the Fort Worth Star Telegram ("the Star") and the Fort Worth Typographical Union Local ("ITU") obligated the Star to contribute to a multi-employer pension plan. During renegotiation of the agreement in August 1981, the Star proposed that it discontinue plan contributions in favor of increasing employee wages. The ITU agreed to this

proposal and, knowing that the Star was concerned about the extent of its exposure to withdrawal liability, allowed the Star to set the date of withdrawal.

The Star determined that withdrawing at any point though December 31, 1982, would result in liability totaling $79,376. If, however, it could delay withdrawal into 1983, it would not have liability. This was because the plan did not have unfunded assets at the close of the 1982 plan year. The Star opted to terminate its pension obligation at 12:01 a.m. on January 2, 1983. There was no attempt to conceal the fact that the date set was selected in order to minimize its withdrawal liability.

The plan sought to compel the Star to pay withdrawal liability as though it had left the pension plan in 1982. The plan contended, as the Fund does here, that the withdrawal date established in the collective bargaining agreement should be disregarded under section §1392(c). It argued that the Star violated that section when it "manipulate[d] the date for cessation of its contributions solely for the purpose of evading or avoiding withdrawal liability." Id., at 1195.

The ITU arbitrator rejected this argument in a multi-step analysis, much of which is applicable here. He first observed that the 1983 withdrawal date was an integral part of a bona fide arms length

collective bargaining agreement benefitting both parties. Concluding that this was not the type of transaction targeted by Section 1392(c), the arbitrator wrote:

> This section is totally inapplicable on the facts herein presented. The terms "evade or avoid" have a well understood meaning in the law. They refer to essentially fraudulent transactions . . . which are designed to prevent the employer from actually being assessed the true withdrawal liability which it owes under the statute.

Id. at 1197. The Star had complied with its statutory obligation, and there was not a reasonable basis for contending otherwise.

The court agrees with the ITU arbitrator that section 1392(c) must be considered in the context of the Act as a whole. The MPPAA does not contain a provision authorizing a plan to select a contributor's withdrawal date. Instead, "the law is clear that an employer's withdrawal liability under the MPPAA must be determined by looking at the employer's collective bargaining agreement." Parmac, Inc. v. I.A.M. Nat'l Pension Fund Ben. Plan A, 871 F.2d 1069, 1072 (D.C. Cir. 1986).

Under the terms of the MPPAA, withdrawal liability and the collective bargaining agreement are

inextricably linked. Section 1381 states that "complete withdrawal" from a plan occurs when an employer "permanently ceases to have an obligation to contribute under the plan." The "obligation to contribute", is defined as "an obligation to contribute arising under one or more collective bargaining agreements." 29 U.S.C. §1392 (a) (1). In ITU, as in this case, the arbitrator recognized that the bona fide collective bargaining agreement fixed the end date of the employer's obligation to contribute to the pension plan. His observation applies with equal force here:

> The Plan has not pointed to anything in the National Labor Relations Act, or any other law, which precludes the parties from picking whatever date they wish to determine when the employer's obligation to contribute to a multi-employer pension plan will cease... The matter is simply left to the business judgment of the employer, and its ability to obtain agreement from the union with which it negotiates.

5 Empl. Benefits Cases at 1198.[5] There is no statutory support for the proposition that a fund "is simply...free to disregard the economic reality of [a] transaction in order to impose a greater withdrawal liability." Id. The court agrees. The Act as a whole dictates that the collective bargaining agreement between SUPERVALU and the Union be given effect; the date of withdrawal specified in that agreement is controlling.

This result is reinforced by the small body of case law which has considered the scope of Section 1392(c).[6] In Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), the Court of Appeals held that an employer's decision to pursue collective bargaining to the point of impasse in order to delay its withdrawal from a pension plan until the next plan year did not transgress Section 1392(c). This was the case

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[5] This observation is echoed in the case law. "[T]he parties to a [collective bargaining agreement] may freely determine the extent of the employer's obligation to contribute to a fund, including the exact date of withdrawal." Malden Mills Industries, Inc. v. ILGWU National Retirement Fund, 766 F. Supp. 1202, 1209 (D. Mass. 1991)

[6] Section 1392(c) has not been discussed frequently, but where it has been addressed, it has typically been construed narrowly. *See* Pension Trust Fund of Philadelphia and Vicinity v. Fed. Exp. Corp., No. 80-304, 1995 WL 791317 at *8 n.3 (D. Del. Dec. 27, 1995).

although the motive for the delay was the reduction of withdrawal liability. Id. at 499. Explaining this result, the Court of Appeals quoted the section's legislative history which instructs the arbitrator, the plan sponsor, and the courts to "follow the substance rather than the form" of transactions alleged to run afoul of [section 1392(c)]. Id. at 449. The legislative history also indicates that section 1392(c) was drafted in order that:

> employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. [An employer] will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson). According to the Court of Appeals, bona fide arm's length negotiations which are not deceptive and do not violate or undermine the purposes of the MPPAA do not constitute evasion or avoidance within the meaning of 1392(c).[7]

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[7] Courts addressing the application of Section 1392(c) have done so most often where a conveyance of assets to or other dealings with subsidiaries are suggestive of bad faith. *See e.g.*, Sherwin-Williams Co. v. N.Y.State Teamsters Conference Pension & Retirement Fund, 158 F.3d 387 (2d Cir. 1998) (stating that weak financial status of subsidiary made avoid or evade motive more likely); Santa Fe Pacific Corp. v. Central

The Arbitrator in this case deemed the decision in ITU irrelevant and rejected the reasoning of the Court of Appeals in Cuyamaca because in those cases, the plan did not have unfunded vested benefits at the time of the employer's withdrawal. Consequently, the burden on the remaining employers did not change.

Although this view is superficially appealing, it does not comport with the Act. Congress did not address the risk that an employer's withdrawal would burden the remaining employers by forbidding withdrawal.[8] Nor did it tie the right to

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States, Southeast and Southwest Area Pension Fund, 22 F.3d 725,729 (7th Cir. 1994) (finding employer's sale of subsidiary's stock instead of assets suggested intent to avoid or evade liability); Flying Tiger Line v. Teamsters Trust Fund of Philadelphia, 830 F.2d 1241 (3d Cir 1987) (focusing on whether sale of subsidiary's stock was sham transaction); Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia, 787 F.2d 897 (3d Cir. 1986) (finding that sale of motor freight business did not violate Section 1392(c) where, regardless of seller's motive, buyer continued to make payments to fund; characterizing Section 1392 as embodying "good faith" requirement).

[8] Congress underscored the right to withdraw in section 1401(e) of the Act. This section authorizes an employer to obtain from the plan sponsor "general information" in order "to compute its withdrawal liability." It also allows the employer to request "an estimate of ... [its] withdrawal liability." This information is available to facilitate the employer's withdrawal decision. Reliable Liquors, Inc. v. Truck Drivers & Helpers

withdraw to the financial health of the plan. Instead, Congress chose to reduce that risk by requiring that an employer choosing to withdraw accept specific economic consequences.

The Arbitrator's approach to section 1396(c) unduly restricts an employer's ability to make economic decisions, imposing limitations on an employer's ability to withdraw from a plan that do not appear - even by implication - in the Act. Under the Arbitrator's reasoning, an employer and a union may agree to time a withdrawal to minimize the employer's withdrawal liability only if the plan is fully funded at the time of withdrawal. Stated another way, the Arbitrator's approach forbids an employer and a union from negotiating a withdrawal date in a plan year where the plan has or is predicted to have a shortfall, but was healthy in the prior plan year.[9] Agreeing to a withdrawal date in a "down"

Local Union No. 355 Pension Fund, 240 F. Supp. 2d 450 (D. Md. 2003).

[9] The level of uncertainty created by the Arbitrator's reasoning is highly problematic. Is it permissible to set a withdrawal date in a current plan year if it is only likely that a plan will experience a shortfall? How likely must it be? Who will decide?

The conundrum can also be framed in terms of identifying the point in the plan year when section 1392(c) is applicable. The Arbitrator does not explain how it is possible to determine the date before which an employer must withdraw in order to avoid the application of Section 1392(c). Is an employer

year will trigger the application of 1392(c), nullifying the collective bargaining agreement, effectively forcing the employer to incur withdrawal liability or remain in the plan. The court does not find any reason to believe that this is what Congress intended.

The court's rejection of the Arbitrator's reading of Section 1392(c) does not mean that it fails to recognize that SUPERVALU's decision to favor its own economic interest by withdrawing from the plan on the very last day of the plan year seems, on its face, unfair. As is true of most legislation, however, the Act is not perfect. Admittedly, in some circumstances it is possible for employers and unions to squeeze through statutory loopholes in order to realize an economic advantage at the expense of others. Assuming, arguendo, that this was SUPERVALU's motive, its acts certainly did not rise above, nor did they fall below what the law requires. What is unfair, of course, is not always illegal.

Although he sought to safeguard the economic well being of all of the employers contributing to a plan, the Arbitrator was not free to do so by adopting rules more stringent than those enacted by Congress. The court is convinced

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"safe" within the first six months of the year? Is November risky?

that even where an employer withdraws from a plan with unfunded benefits, the ITU arbitrator's analysis is more faithful to the Act as a whole. Accordingly, the court adopts the following portion of that opinion as its holding:

> [The] MPPAA should be construed similarly to the Internal Revenue Code, under which taxpayers are encouraged to use all legitimate means to minimize their tax liability . . . The transaction . . . had full economic substance, insofar as the employer's and employees' relationship to the Plan [was] concerned. Nothing in the MPPAA requires an employer to pick a withdrawal date to the Plan's advantage rather than its own.

5 Empl. Benefits Cases at 1196.

V. Conclusion

For the foregoing reasons, the court recommends that the Arbitrator's award be set aside. The Motion for Summary Judgment filed on behalf of SUPERVALU (Doc. 13) should be granted; SUPERVALU's withdrawal liability should be calculated based on its withdrawal at end of plan year 2002. The motion for Summary Judgment filed on behalf of the Fund (Doc. 11) seeking confirmation of the Arbitrator's award

fixing SUPERVALU's withdrawal in plan year 2003 should be denied.

In accordance with the Magistrate's Act, 29 U.S.C. § 636 (b) (1) (B), 636 (b) (1) (b) and (c), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by May 2, 2006. Responses to objections are due by May 12, 2006.

April 11, 2006

/S/ Francis X. Caiazza
Francis X. Caiazza
U.S. Magistrate Judge

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AMERICAN ARBITRATION ASSOCIATION MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY ARBITRATION

SUPERVALU, INC.

AND

SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND

AAA Case No. 55-621-00450-03

August 14, 2004, Decided

For SUPERVALU, Inc.: Edward R. Mackiewicz, Esq., Patrick S. Menasco, Esq., Steptoe & Johnson, LLP, Washington, DC.

For Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund: Vincent P. Szeligo, Esq., Brendan R. Delaney, Esq., Wick, Streiff, Meyer, O'Boyle & Szeligo, P.C., Pittsburgh, PA.

Robert E. Nagle, Arbitrator.

ARBITRATOR'S FINDINGS, OPINION AND AWARD

I. INTRODUCTION

This arbitration was initiated pursuant to Section 4221 of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to review an assessment of withdrawal liability by the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund (the "Fund") against SUPERVALU, Inc.

The arbitrator was selected in accordance with the Multiemployer Pension Plan Arbitration Rules of the American Arbitration Association, and the proceeding was administered by the Philadelphia, Pennsylvania office of the Association. The matter was submitted for decision on cross motions for summary judgment, without an evidentiary hearing, on the basis of a joint appendix of exhibits. Briefs and responsive briefs were also filed by the parties.

II. STATEMENT OF FACTS

The Fund is a multiemployer pension fund which provides retirement benefits to covered workers employed by companies having collective bargaining agreements with various Teamster local unions.

SUPERVALU, Inc. ("SUPERVALU" or "the Company"), one of the Nation's largest wholesale food distributors, was one of those contributing employers. During the period relevant here, it owned and operated a

grocery warehouse distribution facility ("the Facility") at Belle Vernon, Pennsylvania. SUPERVALU operated the Facility under various successive collective bargaining agreements with Teamsters Local Union No. 872 ("the Union"). Those collective bargaining agreements obligated the Company to contribute to the Fund on behalf of drivers, warehouse employees, and mechanical and building maintenance employees at the Facility. By their terms, the most recent such bargaining agreements were set to expire on January 31, 2003.

In early 2002, SUPERVALU made the decision to close the Facility due to a shrinking customer base and associated reductions in the volume of business. By letter dated March 14, 2002 (JA 21),[1] the Company announced to its employees that it would be transferring most of the Facility's warehousing and distribution operations to another existing facility located in New Stanton, Pennsylvania, with final transfer of operations expected by late summer of 2002. The Facility's closing was expected to result in the loss of some 300 jobs. SUPERVALU then negotiated with representatives of Local 872 during March through May of 2002 over the effects of the closing.

Among the factors that influenced the negotiations was the matter of SUPERVALU's potential withdrawal liability to

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[1] "JA" refers to the Joint Appendix of documents which the parties have stipulated are authentic and admissible as evidence. JA references include the exhibit number and, if applicable, the page number. The exhibits are paginated AAA0001 through AAA0481.

the Fund. Either the cessation of covered operations at the Facility or the cessation of the obligation to contribute to the Fund for its employees would result in the Company's complete withdrawal from the Fund under the provisions of MPPAA.[2]

The date of any such withdrawal became a matter of great significance to the Fund and to the Company. If a withdrawal occurred prior to the conclusion of the Fund's plan year which ended on June 30, 2002, SUPERVALU would have no withdrawal liability, because the Fund, as of the end of the previous plan year, had no unfunded vested benefits. (JA 20.) However, due to the Fund's investment experience during the plan year ending June 30, 2002, any withdrawal occurring after June 30, 2002, would result in significant withdrawal liability. It is undisputed that SUPERVALU was well aware of this. The record shows, e.g., that in response to its inquiry, the Company was advised by the Fund's actuary in April, 2002 of the negative return on Fund assets that had been experienced during the first three quarters of the current plan year (July 1, 2001 through March 31, 2002). (JA 27)

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[2] Under § 4203(a) and (e) of the Act, 29 U.S.C. § 1383(a) and (e), a complete withdrawal from a multiemployer plan occurs when the employer "permanently ceases to have an obligation to contribute under the plan," or "permanently ceases all covered operations under the plan," and the date of such withdrawal is the date of the cessation of covered operations or of the obligation to contribute. "Obligation to contribute" means "an obligation to contribute arising . . . under one or more collective bargaining (or related) agreements." 29 U.S.C. § 1392(a)(1).

During the bargaining sessions, SUPERVALU proposed that the CBAs pursuant to which it contributed to the Fund, and which were otherwise due to expire January 31, 2003, instead be terminated and replaced prior to June 30, 2002, so as to eliminate the pension contribution obligation. The Company indicated to the Union representatives that if this were done, it would not incur an anticipated withdrawal liability to the Fund (estimated at the time to be in the range of $1 to $1.5 million), and that additional payments to employees would therefore be available in consideration of their agreement to such a proposal. JA 24 at AAA 0351, 0352; JA 25 at AAA 0364. As a Company representative stated during an April 18, 2002 bargaining meeting:

> As we have said before if we can terminate the contracts before July 1st we would cease contributions into the Pension Fund we could place the money into other benefits for the employees. June 30th will throw us into another fiscal year in the Pension Fund and we might be liable for a large unfunded liability. This is why we are prepared to maximize our employees benefits in other ways.

Minutes of April 18, 2002 Meeting, JA 25 at AAA0364.

SUPERVALU also assured the Union representatives that such action would not adversely affect employee pensions. As reflected in notes of a

meeting on May 14, 2002, a Company representative indicated:

> Our liability goes up in the future. That doesn't make any difference in the benefits you would receive. You would not benefit from us pumping money into the pension but it would cost us.

Notes of Meeting of May 14, 2002, JA 29 at AAA0382.

The upshot of these negotiations was an agreement between SUPERVALU and the Union, signed in late May 2002 (the "Termination Agreement"), which provided that the then-current CBAs would terminate at 11:59 p.m., June 29, 2002, and that new CBAs, "identical in all respects to the terminated agreements except that all provisions relating to pension or pension plan contributions shall be deleted, shall become effective 12:01 a.m., June 30, 2002." The Agreement further provided that each employee entitled to a severance payment "shall receive a lump sum payment of $2,600," and that bargaining unit employees working on or after June 30, 2002 "shall be paid an additional $2.50 per hour above the applicable classification rate...." JA 31 at AAA0404, 0405. An affidavit subsequently prepared by a Company official stated that the terms of the foregoing Agreement, "including an additional $2,600 cash payment per employee and a pay premium of $2.50 per hour for work after June 29, 2002 [were] specifically in exchange for agreeing to terminate SUPERVALU's pension contribution obligations to the Fund." JA 42 at AAA0451.

This Termination Agreement was ratified by the Union membership on May 31, and June 1, 2002. JA 36, at AAA0411.

On June 26, 2002, SUPERVALU delivered the Fund's June 2002 billing invoice with payment of contributions due through June 29, which coincided with the end of the Fund's billing cycle for June. (JA 38). The Company also advised the Fund that its obligation to contribute would terminate on June 29, and that it would accordingly withdraw as a participating employer as of such date. (JA 38) Most of the employees continued working at the Facility until July 27, 2002.

By letter dated February 4, 2003, the Fund issued to SUPERVALU its assessment and demand for payment of withdrawal liability in the amount of $4,316.996. (JA 41) The Fund stated that it had determined that SUPERVALU's withdrawal occurred during the 2002/2003 Plan Year, and that its determination was based on two alternative theories of liability. One was that it had concluded that the Company remained liable to contribute past June 30, 2002 on behalf of three employees who had been injured prior to such date.

Alternatively, the Fund stated that its investigation indicated that a principal motivation of the Company in securing Union agreement to the Memorandum was its desire to avoid responsibility for its share of the underfunding for the Plan Year ending June 30, 2002. The letter went on to state:

> The Trustees understand your plans called for ceasing operations at Belle Vernon by the end of July, 2002, and that you were aware that if your withdrawal date could be structured to occur prior to June 30, 2002, your withdrawal liability would be based on Fund assets and benefit liabilities existing as of the Plan Year ending June 30, 2001 (thereby avoiding the consequences of your creating benefit liabilities for your employees during the entire plan year). You were also aware that your withdrawal liability would include consideration of the assets losses and additional benefits accruing up through June 30, 2002, only if your withdrawal date occurred after June 30, 2002. In other words, although you participated in the Fund for the full plan year, and your employees accrued benefits for a full year's work, you attempted to evade and avoid the liability that arose during that year, leaving that liability to be borne by the employers who remained active in the Fund. In light of the fact that your Company represented approximately 23% of the Fund's contribution base during the 2001/2002 plan year, your Company's effort to avoid underfunding that occurred during the 2001/2002 plan year was irresponsible

JA 41 at AAA0434.

Pursuant to the Fund's withdrawal liability procedures and applicable statutory provisions, SUPERVALU, by letter dated May 1, 2003, requested review of the Fund's demand letter. It argued that as a matter of law, its obligation to contribute for all employees covered by the Fund, including injured and sick employees, ceased on June 29, 2002, and that the cessation of its obligation to contribute, pursuant to bona fide, arm's-length collective bargaining, cannot be disregarded under MPPAA's "evade or avoid" provision.

Receiving no response to its Request for Review, SUPERVALU initiated this arbitration on October 23, 2002, within the applicable time limits. The parties thereafter agreed that through cross motions for summary judgment, they would present argument on the issue of whether the Company engaged in a transaction to evade or avoid withdrawal liability as defined under § 4212(c) of ERISA, 29 U.S.C. § 1392(c), and depending upon the Arbitrator's conclusion, reserve until later phases of the case questions of whether an obligation to contribute on behalf of several injured employees pushed the Company's withdrawal into the 2002/2003 plan year, as well as whether the calculations, assumptions, and methods used in determining the amount of its withdrawal liability were proper.

III. DISCUSSION

The provision at issue here, Section 4212(c) of ERISA (as added by MPPAA), 29 U.S.C. § 1392(c),[3] states as follows:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Giving this provision a straightforward reading, and according to its words their natural meaning, the conclusion seems inescapable that just such a transaction occurred here.

SUPERVALU was fully aware that its intended withdrawal from the Fund after June 30, 2002, would result in its incurring substantial withdrawal liability due to the investment losses the Fund was experiencing during the plan year ending on that date. It accordingly induced the Union and its members to agree to terminate their existing CBAs (which were otherwise due to expire on January 31, 2003) as of June 29, 2002, and to replace them with identical CBAs, stripped the obligation to contribute to the Fund, thus effecting a withdrawal from the Fund one day short of plan year end. To secure the agreement of the Union and its members, SUPERVALU agreed to share the resulting withdrawal liability savings

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[3] References to this provision herein will be to the Code section.

by paying a $2,600 bonus to each of the employees, plus a $2.50 increase in their hourly wages.

Such an arrangement would seem to fit squarely within the plain language of § 1392(c), and justify the Fund's determination that it should be disregarded for purposes of assessing withdrawal liability. The Company contends in effect, however, that the matter is not to be so simply addressed, and that there is substantial authority to support its claim that this is not the type of transaction to which § 1392(c) was intended to apply.

One such authority is Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir.1986), a case which SUPERVALU argues stands for the proposition that in order for a principal purpose of a transaction be to "evade or avoid" withdrawal liability, the parties must mutually intend to evade or avoid such liability. Thus, SUPERVALU asserts, the "evade or avoid" provision cannot apply here, since the Union that negotiated the cessation of the Company's obligation to contribute, and the bargaining unit employees who ratified that agreement, are not themselves subject to withdrawal liability and therefore had no liability to evade or avoid.

As the Company points out, the Third Circuit's case law is controlling here, since the Fund's procedures require that the arbitration be held in Pittsburgh, Pennsylvania, and any action to enforce, modify or vacate the arbitrator's award shall be

brought in the United States District Court for the Western District of Pennsylvania, which falls within the Third Circuit. Accordingly, careful consideration is given here to the Third Circuit's views, as set forth in Dorn's Transportation.

In that case, the owner of Dorn's Transportation, sold the stock of this trucking company to Oneida Motor Freight, a larger trucking company. Both companies were contributing employers to the Teamsters Pension Fund of Philadelphia and Vicinity ("the Plan"). Oneida offered immediate employment to all of Dorn's employees and continued contributions to the Plan for the combined workforce. It was still contributing to the Plan when the latter issued a withdrawal liability assessment against Dorn's Transportation, based on its claim that the transaction should be disregarded under § 1392(c) because Dorn's original owner may have had an intent to evade or avoid withdrawal liability when he sold its stock to Oneida. The Third Circuit rejected this contention, stating:

> We begin by noting that we are not dealing with a transaction in which both buyer and seller conspired to reduce payments or liability to a pension plan. Rather it is undisputable that Oneida was unaware that Dorn's was trying to escape liability of any sort .... Moreover, Oneida did, in fact, offer employment to all of the former Dorn's

> employees, and made payments on behalf of all those employees who accepted this offer.
>
> Surely, § 1392 was designed to guard against the intentional evasion of liability. It may be that Walter Dom entered into the transaction with Oneida in order to escape withdrawal liability. (There is no evidence to this effect on the record but we will assume it to be so arguendo.) However, when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the Plan, it does not appear that a "principal purpose of the transaction" as a whole is to escape liability. Here, given Oneida's lack of awareness of Dom's potential liability and Oneida's long period of continued payments, Oneida cannot be said to have entered the transaction in order to evade liability. In short, the kind of bad faith that § 1392 guards against is not at issue in this case.

787 F.2d at 902.

I do not see how this decision is at all helpful to SUPERVALU in the present case. Basic to the Third Circuit's ruling was its conclusion that at least one of the parties to the transaction - - Oneida - - had every expectation that contributions to the Plan on behalf of all employees would continue in uninterrupted fashion, and,

accordingly, that avoidance of anyone's withdrawal liability was not at all a part of Oneida's purpose.

This, of course, is quite the opposite of the situation in the present case, where both SUPERVALU and the Union explicitly understood that the purpose of the Termination Agreement was to bring about the premature cessation of the Company's contributions to the Fund, thus enabling the Company to avoid incurring a large amount of withdrawal liability, with the Union's members to be rewarded for their cooperation in this endeavor.

SUPERVALU's further effort to find support in the Dorn's Transportation decision for the proposition that § 1392(c) can apply only where both parties have a potential withdrawal liability of their own to evade or avoid is similarly unavailing. The wording of § 1392(c) itself does not support such an interpretation, and I find nothing in the Third Circuit's opinion to suggest that the Court was of such a view.

On a different tack, SUPERVALU argues that MPPAA's evade or avoid provision is inapplicable to the cessation of an employer's contribution obligation resulting from what it describes as bona fide, arm's-length collective bargaining, even if the employer negotiates that cessation with an eye toward minimizing withdrawal liability. The Company cites in this regard, Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers & Food Employers' Pension Trust Fund, 827 F. 2d 491 (9th Cir. 1987), and ITU Pension Plan v. Fort Worth Star Telegram, 5 EBC 1193, 1198 (Mittelman, Arb. 1984)

In Cuyamaca Meats, several employers seeking to minimize their withdrawal liability, delayed the cessation of their obligation to contribute to the pension plan beyond the expiration of their collective bargaining agreements by collectively bargaining until the point of impasse, and by then implementing their proposal to continue contributing for several more months. The result was that their eventual withdrawal occurred at a time when their withdrawal liability would be lower because of the plan's favorable experience during the immediately preceding plan year. The Ninth Circuit found that such result was not an evasion or avoidance of withdrawal liability within the scope of § 1392(c). The Court stated:

> The Employers' ... delay in withdrawing from the Pension Fund did not undermine the goals of the MPPAA. If an employer hesitates to withdraw from a multiemployer pension fund which has high unfunded benefit liability, the pension fund escapes the dangers sought to be abated by the withdrawal liability provisions.... The [Employers'] May 5, 1983 offer [to continue contributions into the next plan year] posed no threat to the financial stability of the Pension Fund.

827 F.2d at 491.

To similar effect is the arbitrator's decision in the Fort Worth Star Telegram case. In that case the employer and the union agreed in collective bargaining that the employer, at some point, could cease contributions to the pension

fund to which it had been contributing for many years, and thereby withdraw. The withdrawal date they eventually agreed upon was January 2, 1983, immediately after the end of a plan year during which the plan's favorable experience would result in reduced withdrawal liability. In holding that this arrangement did not run afoul of § 1392(c), the arbitrator pointed out, among other things, that "in view of the fact that ... there was no unfunded vested liability of the Plan as of the end of 1982, assessing withdrawal liability would simply be a windfall to the Plan, and the remaining employers." 5 EBC at 1199.

It is noteworthy that the Ninth Circuit, in Cuyamaca Meats did not so much look to the actual language of § 1392(c) in deciding that it did not apply to the situation at hand. Rather, it determined that the purposes of this provision did not warrant its application to the facts before it. It is clear that in Cuyamaca Meats, the Ninth Circuit concluded, as did the arbitrator in Ft. Worth Star Telegram, that if an employer manages to continue its contributions through an entire plan year in which the pension plan's position has markedly improved, the employer has acted consistently with the broader statutory purposes, and should not be penalized for having done so. Indeed, as the arbitrator pointed out in Fort Worth Star Telegram, it would simply provide a windfall to the Plan and the remaining employers to hold otherwise (5 EBC at 1199).

However, the facts in the instant case are quite the opposite. SUPERVALU and its employees had the benefit of a full year of participation - - including the accrual of a full year's worth of pension benefits - - during which the Fund suffered losses, but by maneuvering, with the Union's acquiescence, to pull out one day short of year end, the Company attempted to

avoid any responsibility for the unfunded liabilities associated with that adverse experience. As a result, the full burden of funding those liabilities would be shifted to those contributing employers who remained -- one of the consequences that MPPAA was specifically intended to prevent. [4] This was a matter of critical significance, for, as the Fund points out, the Company represented 23% of the Fund's contribution base. Under these circumstances, I believe that the present case is not at all comparable to Cuyamaca Meats or Fort Worth Star Telegram.

SUPERVALU points to language in the Cuyamaca Meats decision which, in isolation at least, appears supportive of its position in the present case. Thus, the Ninth Circuit stated:

> Employer proposals made during negotiations toward a collective bargaining agreement, and motivated, at least in part, by a desire to minimize withdrawal liability, are not transactions entered into in order to evade or avoid withdrawal liability within the meaning of 29 U.S.C. § 1392(c).

827 F.2d at 499.

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[4] See, e.g., § 3(a)4)(A) of MPPAA, 29 U.S.C. § 1001a(a)(4)(A), identifying as one of the problems that led to MPPAA's adoption was that "withdrawals of contributing employers ... frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations ..."

However, the foregoing statement was made by the Ninth Circuit after it had been at pains to point out that the employer's proposal to continue its contributions "in no way frustrated the purposes of the MPPAA," "did not undermine the goals of the MPPAA," "posed no threat to the financial stability of the Pension Fund," and was of such nature that "the pension fund escapes the dangers sought to be abated by the withdrawal liability provisions" (827 F.2d at 499). Clearly, none of those observations could have been applied to SUPERVALU's actions here. Accordingly, given the significantly different context in which the statement cited by SUPERVALU was made, I do not believe it can appropriately be regarded as setting forth a rule that should govern the disposition of the present case.

There remains to be considered SUPERVALU's argument based on a segment of MPPAA's legislative history, which was cited and relied upon in the Cuyamaca Meats and Fort Worth Star Telegram decisions. The language in question is drawn from a statement by Congressman Frank Thompson, a sponsor of the legislation in the House of Representatives. The full statement, as quoted in the Cuyamaca Meats decision, is as follows:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of

> such transactions in determining, assessing, and collecting withdrawal liability. This rule is to apply when evasion of liability is a principal purpose of the transaction, whether or not the transaction has other purposes as well....
>
> Furthermore, we intend that the term 'employer' be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer - - or for that matter any employer contributing to a plan - - will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980), underscoring added.

In both the Cuyamaca Meats and Fort Worth Star Telegram opinions it was concluded that the employers' efforts to extend their contribution obligations were bona fide and at arms length, and that the above quoted statement by Congressman Thompson supported the determination that there was no evasion or avoidance within the intended meaning of § 1392(c).

SUPERVALU relies greatly on this language, arguing that it means that § 1392(c) applies only to transactions which are less than bona fide and arms length (SUPERVALU's Motion for Summary Judgment, at 15). Since SUPERVALU claims that its dealings with the Union over the Termination Agreement were bona fide and at arms length, that, in its view, suffices to dispose of the "evade or avoid" issue. In this regard, I believe the Company seeks far more comfort from Congressman Thompson's words than either his words or the facts of this case warrant.

To begin with, although Congressman Thompson clearly stated that transactions which are not bona fide and arm's length are within the reach of § 1392(c), it does not follow that he thereby intended to exempt all transactions which might in some sense be arguably bona fide. Certainly the words of § 1392(c) itself do not support such a result, nor do any other portions of MPPAA's legislative history that have been cited here. Indeed, Congressman Thompson's statement in the above excerpt, that § 1392(c) may apply where the transaction has "other purposes" as well as avoiding withdrawal liability, strongly suggests his view that a transaction may have bona fide aspects, and still be within the reach of § 1392(c).

I would also note the discussion of § 1392(c) in what appears to be the other major piece of legislative history addressing this particular provision - - the Joint Explanation submitted by the Chairmen of the Senate Finance and Labor and Public Welfare Committees - - which states the purpose of this provision to enable plans "to disregard sham transactions, or

transactions structured to avoid or evade liability." (126 Cong. Rec. 20189, 20195 (1980), underscoring added) -- a description whose underscored portion would seem clearly to encompass the present case.

Certainly, the concept of bona fides or good faith has relevance to the application of § 1392(c), but I believe that careful consideration should be given to the nature of the bona fides or good faith that is being invoked. I note, e.g., that in its Dorn's Transportation decision the Third Circuit made several references to good faith and bad faith, including what it described as "§ 1392's good faith requirement" (787 F.2d at 902).[5] In citing "the kind of bad faith that § 1392 guards against," the Court appears to have in mind transactions in which the parties "conspired to reduce payments or liability to a pension plan." Id. And in its use of the term "good faith," the Court seems clearly to be referring to the absence of an intent to use a transaction as a means to evade liability. Id.

What SUPERVALU is claiming in the present case is something far different. It contends that so long as it was acting

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[5] As did this arbitrator in applying the Dorn's Transportation ruling in In re Flying Tiger Lines Inc. & Teamsters Pension Trust of Phil., 19 Employee Ben. Cas. (BNA) 2830, 2849-50 (Nagle, Arb. 1994), *aff d sub nom.*, Trustees of Teamsters Pension Trust Fund of Phila. v Federal Express Corp., 20 Employee Ben. Cas. (BNA) 1050 (D.Del. 1995), *aff'd*, 96 F.3d 1432 (3d Cir. 1996) (table), *cert denied*, 520 U.S. 1151 (1997).

in good faith (and at arms length) with the Union when they agreed to the Company's proposal to avoid withdrawal liability, then such a transaction is beyond the reach of § 1392(c).

The notion that we should read into § 1392(c) an otherwise unstated exception for cases in which parties agree upon an arrangement specifically designed to avoid withdrawal liability, so long as those parties act in good faith toward one another, strikes me as quite unpersuasive. It is not only contrary to the plain language of § 1392(c) itself, but also entirely inconsistent with the purposes for which it was adopted, and without support in its legislative history. [6]

For the foregoing reasons, I conclude that the Fund properly determined that SUPERVALU engaged in a transaction which had a principal purpose of evading or avoiding withdrawal liability arising under MPPAA.

III. AWARD

1. SUPERVALU's Motion for Summary Judgment is denied.

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[6] See, e.g., Santa Fe Pacific Corp. v. Central States Pension Fund, 22 F.3d 725 (7th Cir. 1994), and Sherwin-Williams Co. v. New York State Teamsters Conference Pension Fund, 158 F.3d 387 (6th Cir. 1998), each of which upheld determinations that the seller of a business had acted with a principal purpose of evading or avoiding withdrawal liability. In neither case does it appear at all relevant to the decision whether or not the parties to those transactions were acting in good faith toward one another.

2. The Fund's Motion for Summary Judgment on the issue of whether SUPERVALU engaged in a transaction with a principal purpose of evading or avoiding withdrawal liability is granted, and its determination that SUPERVALU incurred a complete withdrawal during the 2002/2003 plan year is armed.

3. In accordance with the parties' understandings, SUPERVALU may pursue its challenges concerning the calculations, assumptions, and methods used in determining the amount of its withdrawal liability.

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Robert E. Nagle
Arbitrator

August 14, 2004

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No. 07-723

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

SUPERVALU, INC.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

In appropriate circumstances, does the authority under ERISA section 4212(c), 29 U.S.C. § 1392(c), to assess withdrawal liability without regard to any transaction having a principle purpose to evade or avoid liability, authorize a multi-employer pension plan to disregard a Termination Agreement where it is found that the only purpose of the Termination Agreement is to enable the employer to escape incurring a significant liability to the plan expected as of the closing date and divide the money diverted from the plan between itself and another party?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding are adequately set forth in the Petition.

CORPORATE DISCLOSURE STATEMENT

The Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund is a employee benefit trust fund and is not a corporation with attendant stock ownership. It has no parent corporation and there is no publicly held company that owns 10% or more of the its stock.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("Fund"), respectfully requests that the Court deny the Petition for a Writ of Certiorari ("Petition") submitted by Petitioner, SUPERVALU, Inc.

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED IN THE CASE

Petitioner is correct that this case involves provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* Petitioner is also correct that the primary statute in the case is section 4212(c) of ERISA.

However, Petitioner fails to identify 29 U.S.C. § 1001a, a statutory provision which was chiefly relied upon by the Third Circuit for its interpretation of section 4212(c). That statute, which expressly sets forth "Additional Congressional Findings and Declaration of Policy," is quoted extensively by the Respondent in this Brief.

COUNTER STATEMENT OF THE CASE

Respondent Board of Trustees of the Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund ("Fund") determined that withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") should be based on the date that employment terminated at a facility being shut down by SUPERVALU, Inc. ("SUPERVALU") and covered under collective bargaining agreements requiring contributions to the Fund. In reaching this determination, the Fund applied ERISA section 4212(c) and disregarded a Termination Agreement's terms which ended SUPERVALU's obligation to contribute on the day before the last day of the Fund's July 1, 2001/June 30, 2002 plan year, which was four weeks prior to the date employment terminated at the facility. SUPERVALU believed that this four week premature cessation of pension coverage would allow it to escape a substantial withdrawal liability assessment based on the facility closing date. Petitioner does not contest the fact that the sole purpose of the

transaction was an attempt to escape imposition of withdrawal liability.

The factual findings of the arbitrator, which were left undisturbed in all subsequent court decisions, were that SUPERVALU's purpose in structuring the Termination Agreement was to avoid withdrawal liability and share the savings with the soon to be terminated employees. Pet. App. 71a-75a. The arbitrator rejected Petitioner's suggestion to create an exception based on the union's acquiescence to the transactions, and therefore, upheld the Fund's assessment. Pet. App. 89a-90a.

The district court, adopting the opinion of the magistrate judge, Pet. App. 39a-40a, concluded that while the Termination Agreement between SUPERVALU and the union "seems, on its face, unfair," it was not illegal. It concluded that MPPAA made it "possible for employers and unions to squeeze through statutory loopholes in order to realize an economic advantage at the expense of others." Pet. App. 65a.

The Fund appealed the district court's reversal of its determination that section 4212(c) permitted it to disregard the Termination Agreement's terms. The Court of Appeals for the Third Circuit held that since the only purpose of the Termination Agreement was to evade or avoid withdrawal liability, and since the transaction was contrary to the statutory purpose of MPPAA, the district court erred in creating an exception to the plain language of section 4212(c).

SUMMARY OF THE ARGUMENT

This case presents very unique and unusual facts in which an employer and union terminate pension coverage for employees at a facility which was to be shut down four weeks later with the expectation that the premature termination would allow the employer to escape a substantial withdrawal liability assessment arising from the Fund's deteriorating funding status.

Petitioner's contention that the Third Circuit's interpretation and application of section 4212(c) conflicts with a Ninth Circuit decision fails to account for the differing factual situations which both courts analyzed. The Third Circuit itself explained that its decision was not in conflict with that of the Ninth's Circuit based on the different factual circumstances of the transactions in the two cases.

The extenuated hypothetical cases presented by Petitioner are not actual cases or controversies. Speculation over potential confusion over the precedent of this case does not warrant the grant of certiorari. Furthermore, the Third Circuit's analytical approach, interpreting a statute according to its plain meaning and consistent with statutory findings and policy, is sound.

ARGUMENT FOR DENIAL OF THE WRIT

I. The Third Circuit's Decision Does Not Conflict with *Cuyamaca Meats* or Any Other Circuit Court Decision

Petitioner claims that the Third Circuit's decision conflicts with the Ninth Circuit's decision in *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). Petition 14-18. However, there is no conflict between those two cases because the Third Circuit's decision involved the application of section 4212(c) to unique facts, which were very different than those in *Cuyamaca Meats*. Both the Third and Ninth Circuits considered the factual patterns of each case, and employed the same analytical approach, looking at both the plain language and the goals of the statute. The Third Circuit properly applied section 4212(c) to the transaction in the instant case, explaining that, unlike *Cuyamaca Meats*, the distinctive factual setting underlying this transaction is contrary to MPPAA's statutory purpose, as set forth in MPPAA itself at 29 U.S.C. § 1001a.

A. Unlike in *Cuyamaca Meats*, in the Instant Case, the Transaction Violated MPPAA's Goals, as Set Forth By Congress in 29 U.S.C. § 1001a

The Third Circuit recognized that although there are superficial similarities between the instant case and *Cuyamaca Meats*, a closer look at the cases reveals important distinctions. It found that, like the

Termination Agreement entered into by the Petitioner, the transaction in *Cuyamaca Meats* also violated the plain meaning of the statute. Pet. App. 24a, fn 10. However, unlike the Termination Agreement, the transaction in *Cuyamaca Meats* "did not frustrate the purpose of the statute," and, as a result, the Ninth Circuit had "held that the employers did not violate the statute." *Id.*

In its decision, the Ninth Circuit looked at whether the transaction violated the purpose of MPPAA. In doing so, it found that the purpose of 29 U.S.C. § 1381(a), which imposes withdrawal liability, "is to ensure that multiemployer plans are not rendered insolvent by withdrawing employers." *Cuyamaca Meats*, 827 F.2d at 495-496.[1]

Turning to the facts of the case before it, the Ninth Circuit determined that the transaction did not violate the purpose of MPPAA. It reached this conclusion because the employers' delay in withdrawing from the fund did not threaten the fund's financial stability. Thus, because of the unique circumstances surrounding the transaction, the delay did not bring about the harm that MPPAA was enacted to remedy.

> The Employers' reaction to the MPPAA, their delay in withdrawing from the Pension Fund, *did not undermine the goals of the MPPAA*. If an employer hesitates to withdraw from a

[1] The Ninth Circuit also looked at section 4212(c)'s legislative history. *Cuyamaca Meats*, 827 F.2d at 499 (citing 126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson)).

> multiemployer pension fund which has high unfunded benefit liability, the pension fund escapes the dangers sought to be abated by the withdrawal liability provisions. The Employers' May 5, 1983, offer to Local 229A, and the Employers' resulting delay in withdrawal from the Pension Fund was a candid reaction to the changing financial status of the Pension Fund and to the provisions of the MPPAA. *The May 5, 1983, offer posed no threat to the financial stability of the Pension Fund.*

Id. (emphasis added)

To determine whether the Termination Agreement violated the statutory goals, the Third Circuit looked at 29 U.S.C. § 1001a, which is titled "Additional Congressional findings and declaration of policy." The Third Circuit quoted 29 U.S.C. § 1001a(a) for the proposition that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, [adversely affecting the plan,] its participants and beneficiaries, and labor-management relations." (quoted at Pet. App. 8a).

29 U.S.C. § 1001a(b) contains additional Congressional findings indicating a desire to encourage pension plan continuation and to protect plan participants.

> The Congress further finds that –
>
> (1) it is desirable to modify the current multiemployer plan termination insurance

> provisions in order to increase the likelihood of protecting plan participants against benefit losses; and
>
> (2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

Section 1001a(c) contains MPPAA's policy goals, which include "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, . . . to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and . . . to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans."

In addition to citing section 1001a, the Third Circuit also quoted MPPAA's legislative history, which indicated that the statute was intended to "relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers." H.R. Rep. 869, 96th Cong., 2d Sess., 67, *reprinted* in 1980 U.S. Code Cong. & Ad. News 2918, 2935. (Cited in Pet. App.

8a).[2] The Third Circuit additionally cited a number of cases indicating that MPPAA was intended to ensure that withdrawing employers paid a share of a plan's unfunded benefit liability. Pet. App. 7a-8a, 23a-24a.

The Third Circuit found that "SUPERVALU engaged in exactly the type of conduct Congress was trying to prevent," and that its transaction "threatened the financial stability of the Fund as SUPERVALU withdrew in order to avoid paying its share of

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[2] MPPAA was enacted to discourage employers' efforts to "game the system" by terminating participation before they became legally responsible for the plan's existing unfunded benefit liability. *See Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984). In *Gray*, this Court set forth the history of the enactment of MPPAA, and described the factors that motivated Congress to enact the statute. After ERISA was passed, but prior to the enactment of MPPAA, withdrawing employers were not, in most cases, responsible for their share of the plan's unfunded vested benefits. *Id.* at 721. The system encouraged employers to withdraw as soon as possible to avoid paying the cost increases caused by the withdrawals of other contributing employers, the "so-called inherited liabilities." *Id.* at 722 (fn 2)

In order to remedy this (and other flaws in the pension benefit statutory scheme), Congress passed the MPPAA in 1980. *See id.* at 722-723. Congress was so intent on discouraging withdrawals that it made the MPPAA effective retroactively. *Id.* at 730-731. It was "concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered," and thus made the statute retroactive "to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute." *Id.*

the existing unfunded vested benefit liability." It thus concluded that "SUPERVALU's conduct violated not only the plain language of the statute, but also its purpose." Pet. App. 23a-24a.

The distinctions the Third Circuit made between this case and *Cuyamaca Meats* echoes similar distinctions made by Arbitrator Nagle in the initial decision issued in the dispute between Petitioner and Respondent. Arbitrator Nagle pointed out that the Ninth Circuit had emphasized that the transaction, which involved a continuation of contributions to the plan, did not violate MPPAA's statutory goals, and did not harm the fund's financial stability. He contrasted this with the transaction in the instant case which arose in a "significantly different context." Pet. App. 85a-86a.

Arbitrator Nagle noted that the Ninth Circuit had focused on the purpose of section 4212(c), rather than the statute's language, and that it had determined that the "*purposes* of this provision did not warrant its application to the facts before it." *Id.* at 84a (emphasis in original). According to Arbitrator Nagle, "the Ninth Circuit concluded . . . that if an employer manages to continue its contributions through an entire plan year in which the pension plan's position has markedly improved, the employer has acted consistently with the broader statutory purposes, and should not be penalized for having done so." In such a situation, the payment of withdrawal liability "would simply provide a windfall to the Plan and the remaining employers." *Id.*

Arbitrator Nagle found that "the facts in the instant case are quite the opposite," with Petitioner withdrawing from the Fund just before the end of the plan year in an "attempt[ ] to avoid any responsibility for the unfunded liabilities" incurred by the Fund. *Id.* at 84a-85a. "As a result, the full burden of funding those liabilities would be shifted to those contributing employers who remained – one of the consequences that MPPAA was specifically intended to prevent." *Id.* at 85a. Petitioner's withdrawal was especially harmful to the Fund, given that "the Company represented 23% of the Fund's contribution base." *Id.*

Because of the significant factual differences between the two cases, there is no conflict between the Third Circuit's opinion and *Cuyamaca Meats*. As the Third Circuit and Arbitrator Nagle recognized, the key factor for the court in *Cuyamaca Meats* was the fact that the plan's funding improved between the old and new plan years. The Ninth Circuit determined that a transaction which delays an employer's withdrawal into a year with improved funding, and which does not harm the fund, is not an evasion or avoidance of withdrawal liability. In other words, the aim was not to evade a liability, but rather to get a share of the funding improvement.

The Third Circuit was faced with a completely different fact pattern, one in which an employer took the unusual step of terminating a long-standing benefit just weeks before the benefits would have ended as a result of a facility closing. Pet. App. 22a. Unlike the continuation of contributions past a plan

year in *Cuyamaca Meats*, Petitioner attempted to hasten the cessation of its obligation to contribute to the Fund. Unlike *Cuyamaca Meats*, this cessation would have significantly harmed the Fund.

Because of these factual dissimilarities, the Third Circuit was able to harmonize its decision with *Cuyamaca Meats*. The application of different sets of stipulated facts to legal precepts leading to different conclusions does not create a "conflict with the decision of another US Court," Supreme Court Rule 10, and does not justify this Court granting certiorari.

II. The Third Circuit's Decision Will Clarify the Application of Section 4212(c)

A. The Decision Will Not Lead to Confusion by Other Courts

Petitioner sets forth extravagant hypotheticals to try to show that the Third Circuit's decision will cause a slippery slope, leading courts to incorrectly apply section 4212(c). Specifically, it claims that the Third Circuit's opinion allows the statute to be applied to an unlimited range of transactions, and will thus "destabilize the law applicable to MPPAA withdrawal liability." Petition 18-21.

Section 4212(c) should be applied in accordance with the plain language of the statute, which states that it may be applied to "*any* transaction" which has "a principal purpose . . . to evade or avoid [withdrawal] liability." (emphasis added). The Third Circuit's opinion was in accord with the statutory text,

and refused to apply an exception which does not appear in the language of the statute itself. It therefore applied section 4212(c) to a transaction whose principal purpose was unquestionably to evade or avoid withdrawal liability.[3]

Petitioner fails to explain how a broad interpretation (which is in accordance with the broad language of the statute) could lead to confusion. There is no reason that courts and arbitrators should have any more trouble applying a broad interpretation than a narrow one. In fact, almost fifteen years ago, the Third Circuit refused to limit the term "transaction" in applying 29 U.S.C. § 1369(a), the parallel statute to section 4212(c) which applies to single employer pension plans. *See Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.* 998 F.2d 1192 (3d Cir. 1993), *cert. denied, White Consol. Industries, Inc. v. Pension Ben. Guar. Corp.*, 510 U.S. 1042 (Jan. 10, 1994) (No. 93-661).[4] Despite this broad interpretation

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[3] *See* the Third Circuit's decision, Pet. App. 21a-22a ("There is no doubt that SUPERVALU had the intent required by the statute. . . . As there was no other reason for SUPERVALU to enter the Termination Agreement, its intention to evade or avoid withdrawal liability was a principal purpose, if not its only purpose.") Petitioner does not contradict this finding in their Petition.

[4] In *White Consolidated,* 998 F.2d 1192, 1194-1195 (3d. Cir. 1993), the Pension Benefit Guarantee Corporation applied section 1369(a) to disregard a transaction in which subsidies were paid by a corporation to a pension plan after it had sold a failing business which sponsored the plan. The contributions were meant to prop up the plan so that it could survive for a few years, relieving the former employer of liability. *Id.* at 1195. The

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by the Third Circuit, there has not been any apparent confusion among lower courts regarding the application of section 1369(a).[5]

B. The Third Circuit's Decision Does Not Conflict with the Non-Precedential *ITU* Opinion

Petitioner also argues that certiorari should be granted because it believes that the Third Circuit's decision is at odds with the arbitrator's decision in *ITU Pension Plan and Ft. Worth Star Telegram*, 5 E.B.C. 1193 (E. Mittleman Arb. 1984). Petition 22-25. However, like *Cuyamaca Meats*, *ITU* can be reconciled with the Third Circuit's decision because that

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court found that the statute broadly applied to "any transaction . . . to evade liability," which could include the contributions made by the company. *Id.* at 1200.

[5] In a footnote, Petitioner claims that almost every advisory opinion issued by the Pension Benefit Guarantee Corporation ("PBGC") that mentions section 4212(c) "has involved an asset sale, the sale or spin-off of a subsidiary, or both." Petition 21-22, fn 8. However, the PBGC never suggested that these were the only scenarios in which section 4212(c) could be applied. Furthermore, given the unique set of facts in this case, it is not unusual that the PBGC would not have been presented with a similar case. Finally, as the PBGC itself recognizes, it is not the proper channel for a dispute regarding withdrawal liability. *See, e.g.*, PBGC Opn. 81-41 (MPPAA "provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and, if necessary, in the courts," and, as a result, "the PBGC will ordinarily avoid interjecting itself in such a determination by issuing an opinion on the application of the law.").

case had a vastly different fact pattern than the instant case.

As an initial matter, Respondent points out the obvious fact that *ITU* was a decision issued by an arbitrator, not a circuit court. Even if this Court believes that the decisions conflict, under Supreme Court Rule 10, a conflict between an arbitration decision and a circuit court case does not justify granting certiorari.

Additionally, Petitioner ignores the important factual distinctions made by Arbitrator Nagle between this case and *ITU*. Section I of this Brief cited language from Arbitrator Nagle's decision which distinguished the instant case from *Cuyamaca Meats* because the employer's actions did not harm the fund, and any payment of withdrawal liability could be a windfall for the fund. Arbitrator Nagle applied the same analysis to *ITU*, distinguishing that case from the case before him. Pet. App. 84a-85a.

Arbitrator Nagle correctly analyzed *ITU*, in which Arbitrator Mittleman recognized that his decision was dependent on the specific facts of the case. Like *Cuyamaca Meats*, *ITU* involved an employer's attempt to delay its withdrawal from a fund into the next plan year so that it could benefit from the fund's improved financial status. In *ITU*, 5 EBC at 1198, the arbitrator found that "the critical fact . . . is that contributions were made for the full" previous plan year. Because there "was no unfunded vested liability of the Plan as of the end of" the previous plan year, "any withdrawal liability payment . . .

would simply be a windfall to the Plan, and the remaining employers." *Id.* at 1199. The decision was thus greatly influenced by the fact that the transaction would not harm the fund, and that a withdrawal liability assessment would only be a windfall for the fund. By way of contrast, in the instant case, the Petitioner sought to exit the Fund before the next plan year, rather than delaying its departure, causing significant harm to the Fund.

C. The Third Circuit Was Correct In Refusing to Alter the Plain Language of Section 4212(c)

Petitioner criticizes the Third Circuit's decision for its reliance on dictionary definitions to define the term "evade or avoid." Citing the District Court's decision, it claims that the phrase should have been interpreted as a "term of art," which only refers to fraudulent transactions. Petition 24-25. However, the Third Circuit interpreted section 4212(c) in accordance with its plain language, which does not limit its application to fraudulent or sham transactions.

Because the words used in section 4212(c) were not defined in the statute, the Third Circuit found it necessary to rely on "their ordinary and natural meaning, *United States v. E.I. DuPont De Nemours & Co., Inc.*, 432 F.3d 161, 171 (3d Cir. 2005), and 'the overall policies and objectives of the statute,' *United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997) (citing *Brown v. Gardner*, 513 U.S. 115, 117-19, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994))." Pet. App. 19a. It

used the dictionary definitions to provide a "plain language"[6] reading of the statute, under which "the provision applies when a contributing employer enters a transaction with a principal purpose of escaping its duty to pay withdrawal liability to the plan or fund." *Id.* at 20a.

The Third Circuit correctly refused to add an exception to the plain language of section 4212(c), which does not require that transactions be fraudulent in order to be disregarded. It found that "the statute is clear" that it is not limited "to sham or fraudulent transactions," and, as a result, the Third Circuit did not have to look to the statute's legislative history. Pet. App. 27a-28a.

This refusal to elevate legislative history over the plain statutory text was in accord with this Court's precedent.[7] The Third Circuit cited *Exxon Mobil Corp.*

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[6] The Third Circuit's decision was not the first to employ dictionary definitions in defining the terms of section 4212(c). *See Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Zacek Indus.*, 1994 WL 201042, *3 (N.D. Ill. 1994) (using dictionary definitions to reject the employer's argument that the term "transaction" should be limited); *Sherwin-Williams Co. and New York State Teamsters Conference Pension and Retirement Fund,* 17 E.B.C. 2725, 2748 (M. Gertner, Arb. 1994), *aff'd, Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund*, 969 F. Supp. 465 (N.D. Ohio 1997), and *aff'd, Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund,* 158 F.3d 387 (6th Cir. 1998) (using dictionary definitions of "principal" and "purpose.").

[7] Respondent does not concede that section 4212(c)'s legislative history implies a requirement that a transaction

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v. Allapattah Servs., Inc., 545 U.S. 546, 567-68 (2005) in support of the proposition that it would "not allow an examination of the legislative history to create an ambiguity where none exists in the statute." Pet. App. 28a. In *Exxon*, 545 U.S. at 568, this Court found that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."

The Third Circuit also cited *Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994) in support of its argument that the plain language of the statute "in no way suggests that it only applies to sham or fraudulent transactions." Pet. App. 27a. In *Santa Fe*, 22 F.3d at 729-730, the Seventh Circuit found that the "statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the [MPPAA] by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability . . . is one of the principal purposes of the transaction." *See also Sherwin-Williams Co. v. New York State Teamsters Conference Pension and Retirement Fund,* 158 F.3d 387, 395 (6th Cir. 1998) (finding that section 4212(c) requires only that the desire to evade or avoid withdrawal liability be "a principal purpose" of the transaction, not "the principal purpose," and therefore the

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must be a sham. The Third Circuit merely stated that it was not necessary for it to consider the Act's legislative history.

fact that a transaction may be motivated by multiple principal purposes does not negate the application of the statute.)

The only decision cited by Petitioner in support of its "sham transaction" argument is *ITU*, which is an arbitrator's decision. Its failure to cite any circuit court opinions to contradict the findings in the Third Circuit's decision, *Santa Fe,* and *Sherwin-Williams* means that there is no circuit court split on the issue. There is thus no reason for this Court to grant certiorari given the unambiguous statutory language which does not require that a transaction be a sham or one that is devoid of economic substance.

D. Section 4212(c) Allows Plans to Disregard Any Transaction Having a Principal Purpose to Evade or Avoid Liability

Petitioner criticizes the Third Circuit's determination that an employer does not have the right to choose the date of its withdrawal, and claims that its date of withdrawal was "June 29, 2002 when it ceased to have an obligation to contribute to the Fund under the Termination Agreement." Petition 25-27.[8]

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[8] It is notable that Petitioner does not cite any cases in making this argument. Courts have uniformly found that section 4212(c) allows plans to ignore the purported date of withdrawal if the transaction was enacted to evade or avoid withdrawal liability. *See, e.g., Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698, 701 (W.D.

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Petitioner's argument is based on an inaccurate reading of the statute, and is at odds with the language of MPPAA. It is also an argument on the merits, and does not present any circuit conflict which would justify this Court granting certiorari.

The Third Circuit's determination of the date of withdrawal is derived from the plain language of the statute. The court found that, under section 4212(c), transactions which violate the statute can be disregarded. *Id.* at 24a. Because the Third Circuit "determined that the Termination Agreement violated section 4212(c), the Agreement must be disregarded," and it had to "return to the statute to determine when SUPERVALU actually withdrew." Pet. App. 24a-25a. Under 29 U.S.C. § 1383, "[t]he date of complete withdrawal is the day on which the employer's obligation to contribute to the plan ceases or when all covered operations cease." *Id.* at 25a. Given that "SUPERVALU's cessation of all covered operations

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Mich. 1987) (section 4212(c) "allows transactions made to evade or avoid withdrawal liability to be ignored"); and *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 1995 WL 791371, *4 (D. Del. 1995) (if a sale of a subsidiary is "undertaken principally to avoid MPPAA liability, withdrawal liability would properly be assessed" as if the sale never took place.) The PBGC has provided similar guidance. PBGC Opinion Letters 81-41, 83-18, and 84-7 indicated that, regardless of when a withdrawal occurs under section 1383(a), the transactions could still be ignored by the funds under section 1392(c). *See also* PBGC Op. Letter 85-15 (section 4212(c) "may be applied by a plan, if all the circumstances of the transaction so warrant, to disregard the transaction.").

occurred before its obligation to contribute ceased . . . SUPERVALU actually withdrew when it ceased all covered operations . . . on July 27, 2002." *Id.* at 25a-26a.

The Third Circuit dismissed "SUPERVALU's argument that ignoring the Termination Agreement enables the Fund to just pick a withdrawal date." *Id.* at 25a, fn 12. "[I]gnoring the Termination Agreement does not enable the Fund to pick SUPERVALU's withdrawal date on a whim." *Id.* After a transaction is ignored, the date of withdrawal is determined by MPPAA.[9] *Id.*

E. The Third Circuit's Decision Will Have Little or No Impact on Courts' Application of the Coal Act

Petitioner also claims that certiorari should be granted because the Third Circuit's decision "will also affect implementation of" 26 U.S.C. § 9722, "the 'evade or avoid' provision" of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701, *et seq.* Petition 20. Petitioner also contends that the decision conflicts with *UMWA 1992*

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[9] Petitioner also claims that the Third Circuit incorrectly "assumes an employer that arranges its affairs in a manner that results in a withdrawal in a year with less liability is escaping its 'duty' to pay withdrawal liability." Petition 28. The fallacy of Petitioner's implication is evident from the Third Circuit's noncritical discussion of the lower year liability result reached by the Ninth Circuit in *Cuyamaca Meats*. Pet. App. 24a, fn 10.

Ben. Plan v. Leckie Smokeless Coal Co., 201 B.R. 163, 174 (S.D. W.Va. 1996), which it claims is "the only judicial opinion construing" that statute. *Id.*

As an initial matter, the Coal Act argument should not be considered by the Court because Petitioner raised it for the first time in its Petition for Certiorari. *See Powell v. Nevada*, 511 U.S. 79, 85, fn * (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here.").

The Coal Act arguments may also be dismissed on the merits. Petitioner quotes legislative history indicating that the Coal Act provision is to be "interpreted consistent with Section 4212(c)." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (quoted at Petition 21). However, it cannot cite any case in which a circuit court decision interpreting section 4212(c) (such as *Cuyamaca Meats* or *Santa Fe*) was cited by a court in interpreting the Coal Act. Additionally, the fact that the only case involving this provision is a district court decision which is over 10 years old means that the effect, if any, that the Third Circuit's decision will have on the Coal Act is quite limited.

Because the facts of the two cases are so dissimilar, *Leckie* does not conflict in any way with the Third Circuit's decision. In that case, a company was seeking to buy bankrupt coal operations without assuming liabilities relating to retiree health care under the Coal Act. *Leckie*, 201 B.R. at 167-168. Unlike the instant case, in *Leckie*, the party against whom liability was being asserted was a stranger to the

plan until the transaction was consummated. Petitioner also ignores the distinctions made in *Leckie* between that case and *Santa Fe*, one of the few circuit court decisions interpreting section 4212(c). *Leckie* stated that *Santa Fe* was "inapposite to the case at bar and distinguishable by its extensive factual record on the issue of intent." *Id.* at 174. It went on to list several distinctions between the two cases, including differences between section 4212(c) and the Coal Act provision at issue in *Leckie*. *See id.*[10]

III. There Is No Compelling Reason for this Court to Grant Certiorari

This Court cannot grant a writ of certiorari unless Petitioner presents "compelling reasons." Supreme Court Rule 10. Petitioner claims that its petition should be granted based on this Court's Rule 10(a), which deals with conflicts between two circuit courts of appeals. However, as explained in Section I

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[10] In the Fourth Circuit's decision affirming *Leckie*, *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 578, fn 4 (4th Cir. 1996), the court noted that the parties did not appeal the district court's determination that the transaction did not violate section 9722 of the Coal Act. Despite Petitioner's contention regarding the importance of this Court granting certiorari in employee benefit cases, it denied the petition for certiorari of the Fourth Circuit's decision in *Leckie*. *See United Mine Workers of America 1992 Ben. Plan v. Leckie Smokeless Coal Co.*, 520 U.S. 1118 (Mar. 17, 1997) (NO. 96-1117).

of this Brief, there is no circuit court split because the cases may be distinguished on their facts.

This Court has long held that it "do[es] not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). Certiorari should be denied in cases involving fact-specific issues. *Estelle v. Jurek*, 450 U.S. 1014, 1018 (1981) (Rehnquist, J., dissenting from denial of cert.). "As a general practice the Court does not review cases involving merely individualized circumstances." *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 113 (1959) (Frankfurter, J., dissenting). *See also Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (this Court "adhere[s] to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (this Court should only "grant[ ] the writ of certiorari . . . in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

Petitioner has not presented any compelling reason to justify granting certiorari in this case. Instead, it has largely argued that the Third Circuit's decision was erroneous. Such an argument fails to meet this Court's standard for granting certiorari. *See*

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ").

A. Unlike the Previous Rare Instances in which this Court has Granted Certiorari for MPPAA Cases, this Case Does Not Involve a Circuit Split

In support of its claim regarding the importance of the Third Circuit's decision, Petitioner notes the large number of contributing employers to, and participants covered by, multiemployer pension plans. Petition 28-29. It also cites three cases involving multiemployer plans in which this Court has granted certiorari: *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997); and *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1997).

None of this provides a compelling reason justifying this Court's exercise of its limited resources on this case. Although MPPAA was passed in 1980, and despite the large number of participants in multiemployer funds, Petitioner can only cite three cases in the previous 27 years in which this Court has granted certiorari. Moreover, this case is not at all like those

three cases, which involved explicit splits among circuit courts. *See Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993); *Bay Area Laundry*, 522 U.S. at 200; and *Concrete Pipe*, 508 U.S. at 620.[11]

Additionally, circuit court cases involving section 4212(c) are rare. This Court has denied petitions for certiorari in the few section 4212(c) cases in which it has been requested, such as in *Cuyamaca Meats, cert. denied,* 485 U.S. 1008 (April 18, 1988) (NO. 87-1440); *Santa Fe, cert. denied*, 513 U.S. 987 (Nov. 7, 1994) (NO. 94-449); and *Sherwin-Williams, cert. denied*, 526 U.S. 1017 (Mar. 22, 1999) (NO. 98-1133).

Petitioner also argues that the Third Circuit's opinion could have a large impact because, pursuant to this Court's decision in *Bay Area Laundry*, withdrawal assessments may be made retroactively, and that, based on the Third Circuit's decision, other funds may assess withdrawals going back to 1980. Petition 30-31. This argument, if accepted on its face, would mean that this Court would grant certiorari almost automatically to cases involving withdrawal liability because they all could have retroactive effect. Instead, as noted previously, this Court has only granted certiorari in three MPPAA cases. Finally, it is also unlikely that there will be widespread application of the Third Circuit's decision, given the unusual

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[11] *Concrete Pipe* can be further distinguished because it involved constitutional challenges to provisions of MPPAA.

fact pattern in this case, as well as how rarely section 4212(c) is applied.

B. The Third Circuit's Decision Will Not Discourage Participation in Pension Funds But Will Instead Strengthen Funds

Petitioner claims that the Third Circuit's decision could make companies less likely to agree to contribute to multiemployer pension plans because it would place limitations on their ability to withdraw from funds. Petition 31-32. This ignores the fact that the purpose of MPPAA, as stated in 29 U.S.C. § 1001a, was to strengthen multiemployer pension funds. Congress sought to do so by enacting a withdrawal liability scheme which included a provision allowing funds to disregard transactions whose principle purpose is the evasion or avoidance of liability. Petitioner is essentially arguing that allowing an employer to violate the terms of an act meant to protect pension funds would somehow strengthen those funds.

Finally, Petitioner asserts that the Third Circuit's decision will dissuade companies from seeking information regarding the plan or withdrawal liability under 29 U.S.C. § 1401(e). Petition 32. However, there is nothing in the Third Circuit's decision which indicates that merely requesting and receiving information is enough to justify a finding that a principal purpose of the transaction was to evade or avoid

withdrawal liability. Additionally, Petitioner's argument ignores the fact that § 1401(e) is not designed to provide information to employers solely to help them decide whether to withdraw. *See Brach's Confections, Inc. v. McDougall*, 320 F. Supp. 2d 726, 733-734 (N.D. Ill. 2004) (Section 1401(e) allows employers to access information even after they have withdrawn); *John J. Nissen Baking Co. v. New England Teamsters & Trucking Industry Pension Fund*, 737 F. Supp. 679, 681-683 (D. Me. 1990) (Section 1401(e) is intended, in part, to give withdrawing employers access to information so that they can decide whether the assessment was correct.).

This Court should therefore deny issuance of a Writ of Certiorari for review of the Third Circuit's determination that Petitioner's transaction violated the plain language of section 4212(c), and, pursuant to that statute, the transaction should be ignored.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

SUPERVALU, INC.,
Petitioner,

v.

BOARD OF TRUSTEES OF THE SOUTHWESTERN PENNSYLVANIA AND WESTERN MARYLAND AREA TEAMSTERS AND EMPLOYERS PENSION FUND,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* FOOD MARKETING INSTITUTE, INC. IN SUPPORT OF THE PETITION

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INTERESTS OF THE *AMICUS* [1]

The Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets, including both unionized and non-union companies. Its international membership includes 200 companies from more than 50 countries. SUPERVALU, Inc., the Petitioner in this case, is one of FMI's 1,500 members.

FMI is filing this *amicus* brief in support of the petition in order to alert the Court to the serious disruptive impact of the Third Circuit's decision on employers participating in multiemployer pension plans throughout the country. By reinterpreting the

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[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date for any response. Pursuant to Supreme Court Rule 37.6, the *Amicus* further states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

"evade or avoid" provision of section 4212(c) of the Multiemployer Pension Plan Amendments Act of 1980, as amended (hereinafter "MPPAA") in such a way as to allow pension plans to disregard the terms of *bona fide*, arms-length collective bargaining agreements, the Third Circuit's ruling threatens to undermine the entire collective bargaining process. The Third Circuit's holding also will make it impossible for unionized employers to engage in prudent financial planning, which must frequently involve taking into account the potential impact of withdrawal liability on significant changes in business operations. Under the Third Circuit's holding, for an employer even to consider the potential impact of withdrawal liability in connection with a business restructuring will expose the employer to the risk that its actions will be disregarded by a multiemployer plan.

The Third Circuit's overbroad reading of Section 4212 is not compelled by the language of the statute and disrupts an established consensus of understandings in the business community, based upon judicial, arbitral, and legislative authority, as to the meaning of this important section of MPPAA. The decision creates a conflict between circuits that will cause tremendous uncertainty for the thousands of unionized employers who contribute to multiemployer pension plans. For each of these reasons, FMI as *amicus curiae* supports the petition. The petition should be granted on this issue of great public importance, so that this Court can review and resolve the conflict in the circuits regarding the meaning of Section 4212 of MPPAA.

SUMMARY OF ARGUMENT

The Third Circuit's novel interpretation of MPPAA, absent reversal by this Court, will dramatically and adversely impact large numbers of employers, employees, and pension plans. The Third Circuit has erroneously declared that any employer action that has a principal purpose of minimizing withdrawal liability under MPPAA should be disregarded by a multiemployer pension plan, *even if the action is the result of bona fide collective bargaining*. The impact of this decision on unionized employers will be staggering.

As further explained below, the Third Circuit's decision will undermine the collective bargaining process (which MPPAA was intended to strengthen), and will render employers helpless to plan or execute the most basic financial actions necessary to conduct business, because they will be unable to determine whether such actions will be subsequently disregarded under MPPAA. Ultimately, the Third Circuit's decision will lead to absurd results that will adversely affect the very plan beneficiaries who MPPAA was intended to protect.

The Third Circuit's holding, which conflicts with a decades-old judicial and legislative consensus, thus creates an issue of great public importance, as to which this Court's intervention is urgently required. For these reasons, the *Amicus* asks that the Court grant the petition and reverse the decision of the Third Circuit.

REASONS FOR GRANTING THE PETITION

I. THE PETITION'S CHALLENGE TO THE THIRD CIRCUIT'S APPLICATION OF THE "EVADE OR AVOID" PROVISION OF MPPAA PRESENTS AN ISSUE OF GREAT IMPORTANCE.

A. The Third Circuit's Erroneous Decision Will Undermine The Statutorily Mandated Collective Bargaining Process, In Direct Conflict With Prior Authority.

The issues presented by the petition affect thousands of employers, millions of employees, and the expenditure of billions of dollars. A recent survey indicates that 43% of multiemployer pension plans assessed withdrawal liability against contributing employers in 2006.[2] There are more than 1,500 multiemployer plans nationwide, to which 300,000 employers contribute on behalf of nearly 10 million employees.[3] As of 2005, total assets of such funds exceeded $400 billion.[4]

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[2] *See* Bulletin, Segal, Survey of Multiemployer Pension Plans' PPA '06 Funded Percentage and Projected Zone Status (Spring 2007), *available at* http://www.segalco.com.

[3] PENSION BENEFIT GUARANTY CORP., 2006 ANNUAL REPORT 18, *available at* http://www.pbgc.gov/about/annreports.html.

[4] *See* U.S. DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN ABSTRACT OF 2005 FORM 5500 ANNUAL REPORTS 9 (Dec. 2007).

The multiemployer pension plans that MPPAA was enacted to protect are entirely the product of collective bargaining between employers and unions under a process governed by a separate statute, the National Labor Relations Act, 29 U.S.C. § 151, *et seq*. Under that law, the obligation of an employer to contribute to a multiemployer pension plan arises exclusively from the duty to bargain imposed by 29 U.S.C. § 158(a)(5). *See Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F. 2d 491, 496 (9th Cir. 1987). *See also Trustees of Colorado Pipe Industry Pension Trust v. Howard Elec. & Mechanical Inc.*, 909 F.2d 1379, 1383-84 (10th Cir. 1990).

Indeed, absent a written agreement between an employer and the union representing the employer's employees, it is unlawful for an employer to make contributions to a multiemployer pension plan at all. *Cuyamaca Meats, supra*, at 498. *See also Trustees of Washington Area Carpenters' Pension and Retirement Fund v. Mergentime Corp.*, 743 F.Supp. 422, 425 (D. Md. 1990); *Denver Metropolitan Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3 & Pipefitters Local No. 208*, 586 F.2d 1367, 1369 (10th Cir. 1978). 29 U.S.C. § 302(c)(5). The decision to remain obligated to contribute to such a plan and the amount of such contributions is a mandatory subject of bargaining. *See Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). The rate and continuation of contributions is commonly negotiated between employers and unions as part of an

integrated collective bargaining process that takes into account the competing demands of employers and employees for changes in wages, benefits and working conditions.

The predominant role of the collective bargaining process in the determination of withdrawal liability is made explicit under MPPAA. Section 4203 (29 U.S.C. § 1383) defines a "complete withdrawal" from a multiemployer plan for purposes of assessing withdrawal liability by direct reference to an employer's permanent cessation of its "obligation to contribute under the plan." Such obligation to contribute is explicitly defined in Section 4212(a) of MPPAA as arising "under one or more collective bargaining agreements" or "as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a).

Prior to the Third Circuit's decision, no court had held that a multiemployer pension plan was authorized by MPPAA to require an employer to extend its obligation to contribute to the plan beyond the term agreed to between the employer and the union lawfully representing the employer's employees through the process of *bona fide* good faith collective bargaining. Directly to the contrary, the Ninth Circuit held in *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, supra*, that Section 4212(c) has no application to *bona fide* collective bargaining that results in termination of an employer's obligation to contribute to a plan. As the Ninth Circuit found, such bargaining does not constitute a "transaction" to evade or avoid liability

under Section 4212. To the same effect was the arbitration decision in *Int'l Typographical Union Negotiated Pension Plan and Ft. Worth Telegram*, 5 Empl. Benefits Cas. (BNA) 1193 (1984).[5]

These holdings, as well as that of the district court in the present case, are based upon the common sense view that collective bargaining to cease contributions to a plan cannot violate Section 4212(c), because such bargaining carries out the statutory mandate expressed in Sections 4203 and 4212(a), as discussed above.[6] By holding that a collectively bargained agreement to terminate the employer's obligation to contribute to a multiemployer plan constitutes a "transaction" to "evade or avoid" withdrawal liability, the Third Circuit has radically departed from the previously settled consensus of statutory interpretation of the Act and has disrupted the settled expectations of thousands of employers and the unions who have relied on that interpretation.

The impact of the Third Circuit's holding on the collective bargaining process is by no means limited to the facts of this case, but has far reaching

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[5] In the ITU decision, an arbitrator found that the employer and the union were allowed to negotiate an agreement giving the employer the discretion to select the date of the employer's withdrawal without any Section 4212(c) ramifications, since the agreement was the result of *bona fide*, arm's length negotiations.

[6] Adding to this consensus, the Pension Benefit Guaranty Corporation (PBGC) has not issued any opinions suggesting that Section 4212(c) applies to *bona fide* collective bargaining agreements. *See* Petition at 21-22, n.8

effects. It is not at all uncommon for unions to negotiate reduced pension contributions or even the cessation of contributions altogether, in order to obtain alternative increases in wages or benefits, including increased severance payments in plant shutdowns.[7] If a collectively bargained agreement is deemed to be a "transaction" within the meaning of Section 4212(c) that can be disregarded whenever a principal purpose of the negotiation is to reduce withdrawal liability, then numerous other agreements, negotiated in good faith, would be subject to the same uncertain fate, including the following examples:

- An employer and union may agree to terminate participation in a multiemployer plan in favor of a single employer pension plan that provides enhanced pension benefits to the covered employees. Under the Third Circuit's interpretation of Section 4212(c), the multiemployer plan may disregard the collectively bargained agreement if a principal purpose thereof is to avoid or minimize withdrawal liability.

- An employer and union may seek to avoid a complete withdrawal from a multiemployer plan by agreeing to continue the employment of some of the workers covered by the multiemployer plan, even where such diminished employment results in a "partial withdrawal" under Section

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[7] The Pension Protection Act of 2006 limits the ability of bargaining parties to reduce or eliminate contributions to financially troubled multiemployer plans. *See* 29 U.S.C. § 1082(d)(1)(A) and (f)(4)(A).

4205 of MPPAA. According to the Third Circuit's holding, such agreements, which obviously benefit employees and are expressly authorized by the Act, would nevertheless be subject to being disregarded by the multiemployer plan, due to the parties' intent to avoid a complete withdrawal (and associated withdrawal liability). Faced with this prospect, employers will certainly have less incentive to keep their workers employed in distressed business situations.

- A distressed employer may seek through good faith union negotiations to substitute welcome increases in wages or alternative benefits in exchange for ceasing its obligation to contribute to a multiemployer pension plan much earlier in the plan year than occurred in the present case.[8] The plan may have no unfunded liability at that time, but the employer may be concerned that current economic conditions will lead to withdrawal liability in a future year. According to the Third Circuit's holding, the employer's anticipation of withdrawal liability (and the employer's desire to avoid such liability) may subject it to the sanction of Section 4212(c).

- A distressed employer may locate a potential buyer of the employer's assets who agrees to continue the employment of some of the employer's employees and to continue contributions to the multiemployer plan (albeit at

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[8] The amount of withdrawal liability is a snapshot that applies for an entire year. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 417-19 (1995).

a greatly reduced rate). If the amount or existence of withdrawal liability could be affected by the timing of the sale, neither the selling employer, the union, nor the potential purchaser can know whether the plan will disregard this "transaction" under the Third Circuit's ruling, making it less likely that the sale can be completed and the employees' jobs saved.

- Section 4207 of MPPAA expressly allows employers to abate their withdrawal liability after a complete withdrawal by resuming contributions to the multiemployer plan at a reduced level. Again under the Third Circuit's holding, if a principal purpose of an employer's agreement to resume contributions to the plan is to reduce or eliminate its withdrawal liability, then the employer's action would apparently violate Section 4212(c) and be disregarded.

According to the Third Circuit's decision, each of these agreements, which obviously benefit employees and are expressly authorized by MPPAA, would nevertheless be subject to being disregarded by multiemployer plans. Faced with this prospect, employers will certainly have less incentive to negotiate good faith agreements with their employees' unions that might keep more workers employed but might also reduce or avoid withdrawal liability.

Many other legitimate collective bargaining scenarios can be suggested by which employers and unions often agree for many legitimate reasons to cease the employer's obligations to contribute to a

multiemployer pension plan at a time when withdrawal liability can be avoided or minimized. Until now, such good faith bargaining was both permissible and protected by the mandatory bargaining provisions of the National Labor Relations Act and settled judicial understandings of MPPAA. The Third Circuit's holding upsets this consensus and throws into uncertainty the right of employers and unions to bargain in good faith over the employer's pension contributions, a mandatory subject of bargaining under the NLRA. This Court should grant the Petition and restore the previous consensus view of the application of MPPAA to *bona fide* good faith bargaining agreements.

B. The Third Circuit's Decision Will Undermine Legitimate Financial Planning Efforts Of Unionized Businesses.

The Third Circuit's unprecedented expansion of the "evade or avoid" provision of Section 4212 not only threatens to disrupt the collective bargaining process; the holding will also render thousands of unionized employers helpless to engage in the most basic financial planning. Any effort by such employers to anticipate or otherwise take into account their potential withdrawal liability from year to year, according to the Third Circuit, may allow their actions to be disregarded by plan trustees, because it will always be arguable that a principal purpose of the employer's subsequent actions will be to minimize withdrawal liability.

The disruptive effect of this aspect of the Third Circuit's holding can be readily seen by reviewing the past advice to employers routinely given prior to the Third Circuit's decision by legal experts and financial advisors regarding withdrawal liability. A broad consensus of advisors has long instructed employers to take withdrawal liability considerations into account in making important business decisions.

Among many such examples, readers of the Benefits and Pension Digest learned in 2007 that "[w]ithdrawal liability should be a major consideration in any business today,....Every company should know whether there is withdrawal liability, the rules, risks and costs associated with withdrawal liability, and the estimated amount for every plan to which it is a contributing employer."[9]

Similarly, the online management newsletter *Employment Law 360* has advised its business readers that "[e]very company in a multiemployer plan should find out if the plan is underfunded, and should certainly consider that underfunding before making any significant changes."[10] Individuals who own entities that contribute to a multiemployer pension plan have been further advised that they

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[9] Kenneth D. Stein & Kevin M. Williams, *Risk Management: Multiemployer Pension Plan Withdrawal Liability*, BENEFITS & COMPENSATION DIGEST 38, 42-43 (Oct. 2007) (recommending a series of steps to minimize future liability "as part of prudent risk management").

[10] Keith McMurdy, *Withdrawal Liability: A Hidden Hazard*, EMPLOYMENT LAW 360 (June 20, 2007), *available at* http://www.foxrothschild.com/Newsstand/News.aspx?id=4172.

"should engage in estate planning and investment activities bearing in mind the need to consider the potential withdrawal liability ramifications of those activities."[11]

Employers were similarly advised to "exercise due diligence to determine potential [withdrawal] liability each year in the regular course of business...."[12] Employers were further instructed to "closely investigate whether multiemployer plans are implicated in any anticipated sale or acquisition...."[13]

It is clear from reviewing this consensus of advice on which many employers have properly relied, that few ERISA experts understood Section 4212(c) to have any application outside the context of sham or fraudulent corporate transactions. Otherwise it would make no sense for employers to learn anything about their withdrawal liability prior to engaging in legitimate corporate activities, with or without collective bargaining. Indeed, the mere act of considering such potential withdrawal liability in connection with *any* particular business activity, and

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[11] Labor and Employment Advisory, David Laurent, "Pension Plan Withdrawal Liability Can Reach Estate Planning and Investment Activities" (Nov 2007), *available at* http://www.buchananingersoll.com/news.php

[12] *See Multiemployer Pension Plans in Mergers and Acquisitions*,C&G Review (Spring 2006), *available at* http://www.cohenlaw.com/news-articles-104.html.

[13] Kevin L. Wright, *Its Baack: The Reemergence of Withdrawal Liability* (August 2005), *available at* http://www.littler.com/collateral/print/CF2C5BF9980D758015EBF61705DBB7B2.html.

certainly the act of considering ways to *minimize* such liability, under the Third Circuit's holding, will lead to questions as to whether evading or avoiding the liability was a "principal purpose" of the "transaction." *See Third Circuit Holds That A Transaction Triggering A Withdrawal Was Entered Into In Order To Avoid Withdrawal Liability*, 15 ERISA Litig. Rep. 13 (Oct.-Nov. 2007).

The Third Circuit's unprecedented holding even contradicts published actions of the multiemployer plan representatives, some of whom have announced improvements in their funding status and have invited employers to take advantage of new withdrawal opportunities. For instance, the Employer Chairman of the Western Conference of Teamsters Pension Fund recently celebrated the Trust's funding status and announced to participating employers that "the Trust no longer has an unfunded vested benefit liability (UVBL). This means that there is no withdrawal liability for employers who withdraw from the Plan in 2006."[14].

The Third Circuit's reading of MPPAA thus appears to be divorced from the realities of the business world. Indeed, if the court's holding is not corrected, then employers will be required to make critical financial decisions without giving any consideration to potential liabilities in the millions of dollars, "flying blind" as it were. As is further

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[14] Bernard T. Eilerts, Employer Chairman, Western Conference of Teamsters Pension Trust, "Chairman's Announcement to Participating Employers," (Nov. 13, 2006), *available at* http://www.wctpension.org/employers/improved_funding.html.

discussed below, Congress could not and did not intend such a draconian result.

C. The Third Circuit's Decision Contravenes Congressional Intent.

As the Ninth Circuit properly recognized in *Cuymaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, supra*, 827 F. 2d at 499, Congress never intended Section 4212(c) to be applied in the manner adopted by the Third Circuit. Rather, it is clear that Congress intended by this provision merely to prevent unscrupulous employers who were already subject to withdrawal liability from engaging in sham restructuring transactions to escape their liability. Thus, the sponsors of MPPAA explained their intent as follows:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability. Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through

> transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer – or for that matter any employer contributing to a plan will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Thompson).

Equally explicit was the following statement by Senator Williams:

> [W]e intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form or control, or through transactions which are less than bona fide and arms length. Hence, for example, a building and construction industry employer contributing to a plan – will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. S11672 (1980).

It is also worth noting that Senator Trent Lott discussed the legislative history of MPPAA on the Senate floor in introducing a bill to amend certain procedural rules relating to withdrawal liability in 2003. At that time, Senator Lott correctly described the previous legislative history as follows:

> MPPAA provides that a former employer or former member of a controlled group can still be liable if "a principal purpose" of the business separation transaction was "to evade or avoid" withdrawal liability. The legislative history indicates that the "evade or avoid" provision was designed to prevent unscrupulous employers from dumping a distressed subsidiary in order to evade or avoid withdrawal liability.

149 Cong. Rec. S14809 (2003).

The Third Circuit expressly declined to consider MPPAA's legislative history because of an erroneous belief that the language of Section 4212 (c) is "unambiguous." According to the Court, "The text in no way suggests that it only applies to sham or fraudulent transactions." Pet. App. 27a. The Third Circuit's reading of the text, however, ignores alternative business definitions of its terms. As should also be evident from the conflicting readings of other authorities, the meaning of Section 4212(c) is not as "plain" as asserted by the Third Circuit.

Certainly, each of the key terms of the provision, "transaction," "evade," and "avoid," is capable of multiple definitions other than those selected by the Third Circuit from the American Heritage Dictionary.[15] A commonly used "business

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[15] The Third Circuit cited no authority for its selection of the American Heritage Dictionary (among many possible dictionaries) as the authoritative source for defining statutory

dictionary" contains no less than five different definitions of "transaction," most of which involve the exchange of money or goods between a buyer and seller. *See* www.businessdictionary.com/definition. The business usage of the term "transaction" does not appear to apply to a negotiated decision by an employer and a union to cease contributions to a pension plan in connection with a plant shutdown.[16] Similarly, "evasion" is defined in common business parlance as "escapement from a liability or obligation through trickery or illegal means, such as tax evasion." *Id.*[17]

In the present case, there are no allegations that an exchange of goods between a buyer and seller was involved in the Petitioner's negotiations

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language. *See* Pet. App. 19a-20a. The Third Circuit's citation to the American Heritage definition of "transaction" is also incomplete, ignoring three alternative definitions, including the following: "2. Something transacted, especially a business agreement or exchange. **3.** Communication involving two or more people that affects all those involved; personal interaction. **4.** transactions A record of business conducted at a meeting; proceedings."

[16] According to BusinessDictionary.com, in the context of a commercial transaction, the term "transaction" requires three elements that are not present in collective bargaining: (1) a transfer of goods or services for money; (2) a transfer of title between a buyer and seller, and (3) a transfer of exchange rights between the parties. *Id.*

[17] In other statutory contexts, the concept of an "evade or avoid transaction" has been held to refer to a sham transaction usually involving a third party. *See UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163, 174 (S.D. W. Va. 1996) (interpreting the identical language of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§9701-9722).

with its employees' union representative. Nor was there any allegation of trickery or illegal means, as called for by the above definitions of "evasion or avoid." Given the complexity of MPPAA and its specific application to the business community, it is much more likely that Congress intended to use definitions that the business community would understand, rather than the language of an ordinary dictionary. In any event, the Third Circuit erred in reaching the conclusion that the language of the statute could be characterized as "plain" in the absence of a statutory definition, without any apparent consideration of the consequences to the business world.

Unless corrected by this Court, the Third Circuit's myopic reading of MPPAA will lead directly to the absurd and counterproductive results discussed above. The Third Circuit's decision also creates numerous conflicts within MPPAA itself and between MPPAA and the National Labor Relations Act, as has also been shown above. None of these difficulties arise from the Ninth Circuit's narrower reading of the Act, which reflects the consensus view of ERISA advisors and the business community for the past two decades and is much more consistent with the documented expressions of Congressional intent.

For each of these reasons, the Petition should be granted so that this Court can resolve a conflict that distorts and upsets the settled understanding of MPPAA, to the likely detriment of thousands of employers, unions and employees.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for Writ of Certiorari should be granted.

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